

No. 15618

United States
Court of Appeals
for the Ninth Circuit

RICHARD D. LEUSCHNER, Appellant,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California Banking Corporation, and
UNITED STATES OF AMERICA,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

SEP 19 1957

PAUL F. D. BROWN, CLERK

No. 15618

United States
Court of Appeals
for the Ninth Circuit

RICHARD D. LEUSCHNER, Appellant,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California Banking Corporation, and
UNITED STATES OF AMERICA,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amendment to Answer of Richard D. Leuschner (35398)	30
Answer of First Western Bank & Trust Co. (35398)	10
Answer of Richard D. Leuschner, Intervener (35398)	22
Answer of Richard D. Leuschner to Cross Complaint (35416)	55
Answer of Richard D. Leuschner, Third Party Defendant (35398)	24
Answer of Erida Leuschner Reichert to Original Complaint (35398).....	15
Answer of Erida Leuschner Reichert to Third Party Complaint (35398).....	14
Answer of United States of America to Cross Complaint (35416)	64
Answer of United States of America to Third Party Complaint (35416).....	61

Appeal:

Certificate of Clerk to Consolidated Record on	89
Designation of Record on (DC).....	86
Designation of Record on (USCA).....	297
Notice of	83
Statement of Points on (USCA).....	296
Certificate of Clerk to Consolidated Record....	89
Complaint (35398)	3
Complaint, Third Party (35398).....	6
Complaint, Third Party (35416).....	58
Cross Complaint in Cause No. 456519, Superior Court	49
Deposition of William O. Hogan.....	92
By Mr. DeLew.....	113
By Mr. Jenks.....	118, 125
By Mr. Troxel.....	114
By Mr. Yudkin.....	94, 124
Designation of Record on Appeal (DC-35398- 35416)	86
Designation of Record on Appeal (USCA)....	297
Excerpt From Docket Entries (35398).....	42
Excerpt From Docket Entries (35416).....	84
Findings of Fact and Conclusions of Law (35398-35416)	75

iii.

Judgment (35398-35416)	81
Motion to Amend Answer, Richard D. Leuschner	28
Motion to Bring in Third Party Defendant (35416)	53
Motion to Intervene, Richard D. Leuschner (35398)	19
Names and Addresses of Attorneys.....	1
Notice of Appeal (35398-35416).....	83
Objections by United States to Proposed Find- ings of Fact and Request for Additional Findings of Fact (35398-35416).....	69
Order for Joint Pre-Trial and Joint Trial (35398-35416)	68
Order Granting Motion to Bring in Third Party Defendant (35416).....	54
Order Permitting Amendment to Answer of Richard D. Leuschner (35398).....	29
Order Permitting Intervention (35398).....	21
Petition for Removal (35416).....	46
Cross Complaint (Superior Court).....	49
Summons	48
Statement of Points to Be Relied Upon (USCA)	296

Stipulation of Facts (35398).....	32
Affidavit of Richard D. Leuschner.....	39
Certificate of Assessments and Payments....	38
Final Demand	37
Notice of Levy.....	36
Third Party Complaint (35398).....	6
Third Party Complaint (35416).....	58
Transcript of Proceedings and Testimony.....	126
Closing Argument by Mr. DeLew.....	221
Closing Argument by Mr. Jenks.....	225
Closing Argument by Mr. Troxel.....	228
Exhibit A—(Defendant's)—Affidavit of Ed- ward A. Jackson, M.D. Dated Feb. 25, 1957	169
Opening Statement by Mr. Dealy.....	129
Opening Statement by Mr. DeLew.....	147
Opening Statement by Mr. Jenks.....	127, 137
Settlement of Findings (Mar. 28, 1957).....	272
Witnesses:	
Hogan, William	
—direct (Dealy)	152
—cross (Jenks)	160
—cross (DeLew)	162
Leuschner, Richard D.	
—direct (DeLew)	166

NAMES AND ADDRESSES OF COUNSEL

C. RAY ROBINSON,
1812 L Street,
Merced, California

LEWIS, FIELD, DeGOFF and STEIN,
M. S. HUBERMAN,
DeYoung Building,
San Francisco, California

For Richard D. Leuschner.

ORRICK, DAHLQUIST, HERRINGTON &
SUTCLIFFE,
CHRISTOPHER M. JENKS,
405 Montgomery Street,
San Francisco, California,

For First Western Bank and Trust
Company.

JOHN N. STULL,
Acting Attorney General,
Tax Division, Dept. of Justice,
Washington 25, D. C.

LLOYD H. BURKE,
United States Attorney,

LYNN J. GILLARD,
Assistant United States Attorney,
Post Office Building,
San Francisco, California,

For United States of America.

In The United States District Court, Northern
District of California, Southern Division

Civil No. 35398

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California Banking Corporation,
Defendant.

COMPLAINT

The United States of America, plaintiff herein, by the undersigned its attorneys, complaining of the First Western Bank and Trust Company, defendant herein, alleges:

1. The plaintiff, United States of America, is a corporate sovereign and body politic.

2. The defendant, First Western Bank and Trust Company, is a California banking corporation and has its principal place of business in the City of San Francisco, California, within the jurisdiction of this court.

3. This action is brought pursuant to the provisions of the Internal Revenue Code, Title 26, U.S.C., and particularly section 6332(b) thereof.

4. This action has been authorized by the Commissioner of Internal Revenue and approved by the Attorney General of the United States.

5. On July 22, 1955, there was served upon the

defendant a notice of levy pursuant to section-6331 I.R.C., thereby seizing all property, rights to property, monies, credits and bank deposits now in its possession and belonging to Richard D. Leuschner, and notifying the defendant that all sums of money or other obligations owing from it to the taxpayer were thereby levied upon and seized for the satisfaction of Internal Revenue taxes therein itemized, totaling in excess of \$207,000.00, and demand was thereby made upon it for the amount necessary to satisfy the liability set forth therein or for such lesser sum as it may have or be indebted to the taxpayer to be applied as a payment to his tax liability.

6. Defendant has in its possession, subject to levy, the sum of \$7,462.89 and will have from time to time further sums payable to the taxpayer, Richard D. Leuschner.

7. Final demand was served upon the defendant but it has failed and refused to surrender the property or rights to property levied upon.

8. The taxes which formed the basis for the levy were duly assessed and now outstanding against Richard D. Leuschner in an amount in excess of the funds now payable pursuant to the levy.

Wherefore, the plaintiff demands judgment against the defendant, First Western Bank and Trust Company

1. For the sum of \$7,462.89, plus the amount of any additional sums which may be due and payable

as a result of the levy upon the taxpayer's property held by the defendant during the pendency of this action.

2. Interest at 6% per annum from July 22, 1955, upon the amount payable to the taxpayer at that time and from the date payable for any amounts that became due the taxpayer subsequent to that time.

3. That the defendant be ordered to comply with the levy with respect to any further payments as they become due.

/s/ LLOYD H. BURKE,
United States Attorney,

/s/ CHARLES ELMER COLLETT,
Assistant United States Attorney,

/s/ LEON YUDKIN,
Special Assistant to the Regional Counsel, Internal
Revenue Service.

[Endorsed]: Filed April 13, 1956.

In The District Court of the United States, Northern District of California, Southern Division

Civil No. 35398

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COMPANY, a California Banking Corporation,
Defendant.

FIRST WESTERN BANK AND TRUST COMPANY, a California Banking Corporation,
Defendant and Third Party Plaintiff,

vs.

RICHARD D. LEUSCHNER and ERIDA LEUSCHNER REICHERT,
Third Party Defendants.

THIRD PARTY COMPLAINT

First Western Bank and Trust Company, defendant and third party plaintiff above-named, by leave of court first had and obtained, hereby joins Richard D. Leuschner and Erida Leuschner Reichert as necessary parties herein and as third party defendants herein, and alleges:

1. Plaintiff, United States of America, has filed a complaint herein against said First Western Bank and Trust Company, a copy of which is attached hereto marked Exhibit I.

2. Said First Western Bank and Trust Company

is a corporation authorized to and doing a banking and trust business under and by virtue of the laws of the State of California, with its principal place of business in San Francisco, California. Said Richard D. Leuschner and said Erida Leuschner Reichert reside within the Southern Division of the Northern District of California and this court has jurisdiction over the subject matter of this controversy and of the parties hereto.

3. Plaintiff United States of America seeks to recover in this action from said First Western Bank and Trust Company, as set forth in said complaint, the sum of \$7,462.89 and such additional sums as may be hereafter payable to Richard D. Leuschner by said First Western Bank and Trust Company.

4. Said First Western Bank and Trust Company does not have in its possession any sum payable to said Richard D. Leuschner and does not expect hereafter to have in its possession any sums payable to said Richard D. Leuschner except as hereinafter set forth.

5. Said First Western Bank and Trust Company, said Richard D. Leuschner and said Erida Leuschner Reichert are co-trustees under a trust agreement dated April 16, 1941, executed by Ida Denicke Leuschner.

6. Said Richard D. Leuschner is also a beneficiary under said trust agreement, which provides, in part:

“Each and every beneficiary under this trust is hereby restrained from and shall be without right, power or authority to sell, transfer,

pledge, mortgage, hypothecate, alienate, anticipate or in any other manner affect or impair his, her or their beneficial and legal rights, titles, interests, and estates in and to the income and/or principal of this trust during the entire term hereof; nor shall the rights, titles, interests and estates of any beneficiary hereunder be subject to the rights or claims of creditors of any beneficiary, and all the income and/or principal of this trust shall be transferable, payable and deliverable solely to the beneficiaries as herein provided, and the Trustees may require the personal receipt of any beneficiary as a condition precedent to the payment of any money or other property to such beneficiary.”

7. Said co-trustees First Western Bank and Trust Company, Richard D. Leuschner and Erida Leuschner have in their possession a fund in the present amount of \$8,014.44 which is payable to and claimed by said Richard D. Leuschner, as such beneficiary, subject to the conditions set forth in Paragraph 6 hereof, which fund is the same fund plaintiff United States of America is seeking to recover herein from said First Western Bank and Trust Company.

8. Said First Western Bank and Trust Company claims no right, title or interest in said fund or any part thereof, except as one of said co-trustees, but cannot deliver said fund or any part thereof to plaintiff United States of America, to said Richard D. Leuschner and said Erida Leuschner Reich-

ert as said co-trustees, or to said Richard D. Leuschner as beneficiary under said trust agreement until the rights of the plaintiff United States of America and the rights of said Richard D. Leuschner and of said Erida Leuschner Reichert individually and as co-trustees have been finally adjudicated.

9. If plaintiff United States of America is entitled to recover said sum of \$8,014.44 or any part thereof from said First Western Bank and Trust Company, said Richard D. Leuschner and said Erida Leuschner Reichert are, and each of them is, liable to said First Western Bank and Trust Company to the full extent of any such recovery by said plaintiff United States of America from said First Western Bank and Trust Company.

Wherefore, said First Western Bank and Trust Company demands judgment against said Richard D. Leuschner and said Erida Leuschner Reichert for all sums that may be awarded or adjudged against said First Western Bank and Trust Company and in favor of plaintiff United States of America.

Dated: May 3, 1956.

/s/ CHRISTOPHER M. JENKS,

ORRICK, DAHLQUIST,

HERRINGTON & SUTCLIFFE,

Attorneys for First Western Bank and Trust Company.

[Note: Exhibit I, Complaint, is set out at pages 3-5 of this printed record.]

[Endorsed]: Filed May 3, 1956.

[Title of District Court and Cause No. 35398.]

ANSWER OF DEFENDANT FIRST WESTERN BANK AND TRUST COMPANY

Defendant First Western Bank and Trust Company, in answer to the complaint herein, admits, denies and alleges as follows:

1. Admits the allegations set forth in paragraphs 1, 2 and 3 of said complaint.

2. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations set forth in paragraphs 4 and 8 of said complaint, but denies that any sums are now payable from said First Western Bank and Trust Company pursuant to said levy or at all to plaintiff United States of America.

3. Admits that on July 22, 1955 there was served upon said defendant a notice of levy for taxes in an amount in excess of \$207,000.00 alleged to be due to plaintiff from Richard D. Leuschner and that a final demand was served on said defendant on April 5, 1956, but except as so admitted denies generally and specifically all allegations set forth in paragraphs 5 and 7 of said complaint.

4. Denies (except as hereinafter set forth) that said defendant now has or had on July 22, 1955 or at any time since then has had in its possession the sum of \$7,462.89, or any sum, or will have from time to time or at any time hereafter further sums payable to said Richard D. Leuschner. In this con-

nection said First Western Bank and Trust Company alleges that it is one of three co-trustees under a trust agreement dated April 16, 1941 executed by one Ida Denicke Leuschner, and that said Richard D. Leuschner and one Erida Leuschner Reichert are the other co-trustees under said trust agreement; that said Richard D. Leuschner is also a beneficiary under said trust agreement. Said three co-trustees did not have in their possession on July 22, 1955, jointly or separately, any funds payable to Richard D. Leuschner, but now have in their possession jointly but not in the possession of First Western Bank and Trust Company separately a fund in the amount of \$8,014.44 and probably will from time to time hereafter have in their possession, jointly but not separately, further funds payable to said Richard D. Leuschner subject to a condition set forth in said trust agreement, to-wit:

“Each and every beneficiary under this trust is hereby restrained from and shall be without right, power or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate or in any other manner affect or impair his, her or their beneficial and legal rights, titles, interests, and estates in and to the income and/or principal of this trust during the entire term hereof; nor shall the rights, titles, interests and estates of any beneficiary hereunder be subject to the rights or claims of creditors of any beneficiary, and all the income and/or principal of this trust shall be transferable, payable and deliverable solely to the

beneficiaries as herein provided, and the Trustees may require the personal receipt of any beneficiary as a condition precedent to the payment of any money or other property to such beneficiary."

5. Said fund now held by said co-trustees and all funds which may hereafter from time to time be received by said co-trustees payable to said Richard D. Leuschner are claimed by said Richard D. Leuschner as a beneficiary of said trust and adversely to the claim of plaintiff United States of America. Defendant First Western Bank and Trust Company as one of said co-trustees is entitled to and should receive the personal receipt of said Richard D. Leuschner as a condition precedent to the payment of said funds or any part thereof to said Richard D. Leuschner or to plaintiff United States of America for taxes alleged to be due from said Richard D. Leuschner.

As a Further and Separate Defense to Said Complaint and by way of a plea in abatement, First Western Bank and Trust Company alleges:

1. There is now pending in this Court Civil Action No. 35416 to which all persons interested herein, including the United States of America and said Richard D. Leuschner, are parties. Said action was originally filed on March 8, 1956, in the Superior Court of the State of California in and for the City and County of San Francisco, and said United States of America was made a party thereto by order of said Superior Court after due notice

to and without objection from said United States of America, which thereafter removed said action to this Court. Said action, said Civil No. 35416, involves the rights of all parties, including said United States of America, to any and all funds held by said three co-trustees now payable to said Richard D. Leuschner or which may hereafter become payable to said Richard D. Leuschner, and all proceedings in the present action should be stayed and abated pending final determination of said prior action, Civil No. 35416.

Wherefore, said First Western Bank and Trust Company demands plaintiff take nothing by reason of the complaint on file herein, and that it have judgment for costs of suit herein and such other and further relief as may be proper in the premises.

/s/ CHRISTOPHER M. JENKS,
ORRICK, DAHLQUIST,
HERRINGTON & SUTCLIFFE,
Attorneys for First Western Bank and Trust Com-
pany.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed May 4, 1956.

[Title of District Court and Cause No. 35398.]

ANSWER OF THIRD-PARTY DEFENDANT
ERIDA LEUSCHNER REICHERT TO
THIRD-PARTY COMPLAINT

Erida Leuschner Reichert, third party defendant above named in answer to the third party complaint on file herein, admits, denies and alleges as follows:

I.

Admits the allegations set forth in paragraphs 1, 2, 3, 5, 6, 7 and 8 of the said third party complaint.

II.

Alleges that she is without knowledge or information sufficient to form a belief as to the truth of any of the allegations set forth in paragraph 4 of the said third party complaint and for that reason denies the said allegations.

III.

Denies each and every, all and singular, the allegations set forth in paragraph 9 of the said third party complaint as the same apply to third party defendant Erida Leuschner Reichert.

Wherefore, said Erida Leuschner Reichert demands that the third party plaintiff take nothing by reason of the third party complaint on file herein and that she have judgment for costs of suit herein

and such other and further relief as may be proper in the premises.

SLACK AND ZOOK,
JOHN E. TROXEL,

/s/ By JOHN E. TROXEL,
Attorneys for Third Party Defendant Erida
Leuschner Reichert.

[Endorsed]: Filed May 8, 1956.

[Title of District Court and Cause No. 35398.]

ANSWER OF THIRD-PARTY DEFENDANT
ERIDA LEUSCHNER REICHERT TO
ORIGINAL COMPLAINT

Third Party Defendant, Erida Leuschner Reichert, in answer to the original complaint herein admits, denies and alleges as follows:

I.

Admits the allegations set forth in paragraphs 1, 2 and 3 of the said original complaint.

II.

Alleges that she is without knowledge or information sufficient to form a belief as to the truth of any of the allegations set forth in paragraphs 4, 5, 7 and 8 of the said original complaint but admits that she has been informed and believes and therefore alleges that said United States of America served some sort of a notice of levy upon the above

named First Western Bank and Trust Company pertaining to any credits or moneys belonging to the above named Richard D. Leuschner.

III.

Alleges that she is with said First Western Bank and Trust Company one of three co-trustees under a trust agreement dated April 16, 1941, executed by one Ida Denicke Leuschner and that the said Richard D. Leuschner is also a co-trustee under the said agreement; that the said Richard D. Leuschner is also a beneficiary under said trust agreement; that said co-trustees did not have in their possession on July 22, 1955, jointly or severally, any funds payable to Richard D. Leuschner but now have in their possession jointly as such co-trustees a fund in the amount of approximately \$8,014.44 and probably will from time to time thereafter have in their possession jointly as such co-trustees further funds payable to said Richard D. Leuschner subject to a condition set forth in said trust agreement, to-wit:

“Each and every beneficiary under this trust is hereby restrained from and shall be without right, power or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate or in any other manner affect or impair his, her or their beneficial and legal rights, titles, interests, and estates in and to the income and/or principal of this trust during the entire term hereof; nor shall the rights, titles, interests and estates of any beneficiary here-

under be subject to the rights or claims of creditors of any beneficiary, and all the income and/or principal of this trust shall be transferable, payable and deliverable solely to the beneficiaries as herein provided, and the Trustees may require the personal receipt of any beneficiary as a condition precedent to the payment of any money or other property to such beneficiary.”

IV.

Said fund now held by said co-trustees, as such co-trustees, and all funds which may hereafter from time to time be received by said co-trustees as such co-trustees are claimed by said Richard D. Leuschner as a beneficiary of said trust and adversely to the claim of plaintiff United States of America. Defendant Erida Leuschner Reichert as one of said co-trustees is entitled to and should receive the personal receipt of said Richard D. Leuschner as a condition precedent to the payment of said funds or any part thereof to said Richard D. Leuschner or to plaintiff United States of America for taxes alleged to be due from said Richard D. Leuschner.

As a Further and Separate Defense to Said Complaint and by way of a plea in abatement, said Erida Leuschner Reichert alleges:

1. There is now pending in this court Civil Action No. 35416, to which all persons interested herein, including the United States of America, Richard D. Leuschner and First Western Bank and Trust Company, are parties; said action, Civil Ac-

further ground that, as trustee and beneficiary of the aforementioned trust, he will or may be bound by a judgment in this action while the representation of his interests by the present defendant may not be adequate.

Richard D. Leuschner bases his motion on the further ground that there is pending in this court another suit involving the same subject matter as this action, and that intervention herein will enable the court to decide all questions of law and fact in the two suits and finally to determine the rights of all the parties thereto.

Dated: May 2, 1956.

/s/ M. MITCHELL BOURQUIN,

/s/ GEORGE DeLEW,

Attorneys for Applicant for
Intervention.

Notice of Motion

To plaintiff United States of America and to Messrs. Lloyd H. Burke, Charles Elmer Collette and Leon Yudkin, its attorneys, and to defendant First Western Bank and Trust Company, a California Banking Corporation, and to Messrs. Orrick, Dahlquist, Herrington & Sutcliffe, its attorneys:

Please Take Notice that the undersigned will bring the above motion on for hearing before the Presiding Judge of this Court at Room 256 Post Office Building, San Francisco, California, on Monday, the 21st day of May, 1956, at 9:30 A.M. of that day, or as soon thereafter as counsel can be

heard. A draft of the Order proposed is attached.

Dated: May 3, 1956.

/s/ M. MITCHELL BOURQUIN,

/s/ GEORGE DeLEW,

Attorneys for Applicant for
Intervention.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 8, 1956.

[Title of District Court and Cause No. 35398.]

ORDER PERMITTING INTERVENTION

Upon the application of M. Mitchell Bourquin and George DeLew, attorneys for applicant for intervention in the above entitled action, and good cause appearing therefor:

It Is Hereby Ordered that Richard D. Leuschner is granted leave to appear in the above entitled action as Intervenor.

Dated: May 21, 1956.

/s/ EDWARD P. MURPHY,

United States District Judge.

[Endorsed]: Filed May 21, 1956.

[Title of District Court and Cause No. 35398.]

ANSWER OF RICHARD D. LEUSCHNER,
INTERVENOR

Comes now intervenor Richard D. Leuschner and admits, denies and alleges as follows:

I.

Admits all of the allegations contained in paragraphs I, II, III, IV, VII and VIII of plaintiff's complaint.

II.

Admits that a notice of levy was served upon defendant First Western Bank and Trust Company, a California banking corporation, and that said defendant was notified of the matters and things as therein set forth, and that demand for the sums was made, all as alleged in said complaint, and except as so expressly admitted, denies each and every, all and singular, the remaining allegations therein contained.

III.

Denies each and every, all and singular, the allegations contained in paragraph VI of plaintiff's complaint, and denies that said defendant has in its possession the sum of \$7,462.89, or any sum or at all.

Second Defense

I.

Alleges that defendant First Western Bank and

Trust Company, a California banking corporation, is one of three trustees of the trust created by Ida Denicke Leuschner, and that the sums of money referred to in plaintiff's complaint are held by said defendant in its capacity as trustee, and not individually, and that its possession of said sums is the possession of the three trustees, viz.: First Western Bank and Trust Company, Richard D. Leuschner, intervenor herein, and Erida Leuschner Reichert, and that no levy or notice of levy's has ever been served upon said trustees.

II.

Alleges that the aforesaid trust created by Ida Denicke Leuschner is one created to receive the rents, issues and profits of real and personal property within the meaning of §859 of the Civil Code of the State of California; that said trust contains so called "spendthrift" provisions providing that all of the proceeds thereof be paid only to the beneficiaries thereof and to no one else, and that said beneficiaries shall have no right to alienate or transfer their interests therein, nor shall said trust, or any of the proceeds thereof, be subject to any claims of creditors, nor may the interests of any such beneficiaries be transferred or made payable to any other person, firm, corporation or entity.

III.

Alleges that intervenor is one of the beneficiaries of said trust, and that all of the sums otherwise payable to him under the terms of said trust are necessary for his support within the meaning of

§849 of the Code of Civil Procedure of the State of California.

Wherefore, intervenor prays that plaintiff take nothing by its said complaint, and that this action be dismissed as to all parties, and that intervenor have judgment for his costs.

/s/ M. MITCHELL BOURQUIN,

/s/ GEORGE DeLEW,

Attorneys for Intervenor.

[Endorsed]: Filed May 23, 1956.

[Title of District Court and Cause No. 35398.]

ANSWER OF THIRD PARTY DEFENDANT
RICHARD D. LEUSCHNER

Comes now Richard D. Leuschner, joined herein as third party defendant and, in answer to plaintiff's complaint and to the third party complaint of defendant First Western Bank and Trust Company, admits, denies and alleges as follows:

First Defense to Complaint of Plaintiff

That the complaint fails to state a claim against defendant First Western Bank and Trust Company, a California banking corporation, upon which relief can be demanded.

Second Defense to Complaint of Plaintiff

I.

Admits that a notice of levy was served upon defendant First Western Bank and Trust Com-

pany, a California banking corporation, and that it was notified of the matters and things set forth in paragraph 5 of plaintiff's complaint and, except as expressly so admitted, denies each and every, all and singular, the remaining allegations therein contained, and alleges that no warrant of distraint was ever made, issued or served on it.

II.

Denies each and every, all and singular, the allegations contained in paragraph 6 of plaintiff's complaint, and denies that defendant First Western Bank and Trust Company, a California banking corporation, has in its possession the sum of \$7,-462.89, or any sum or at all, and denies that said banking corporation will, in the future, have any funds in its possession payable to this answering third party defendant.

Third Defense to Complaint of Plaintiff

I.

Alleges that defendant and third party plaintiff First Western Bank and Trust Company, a California banking corporation, is one of three trustees of the trust created by Ida Denicke Leuschner, and that the sums of money referred to in plaintiff's complaint are held by said bank in its capacity as trustee, and not individually, and that its possession of said sums is the possession of the three trustees, viz., First Western Bank and Trust Company, Richard D. Leuschner, third party defendant herein, and Erida Leuschner Reichert, and that

no levy or notice of levy has ever been served upon said trustees.

II.

Alleges that the aforesaid trust created by Ida Denicke Leuschner is one created to receive the rents, issues and profits of real and personal property within the meaning of §859 of the Civil Code of the State of California; that said trust contains so called "spendthrift" provisions providing that all of the proceeds thereof be paid only to the beneficiaries thereof and to no one else, and that said beneficiaries shall have no right to alienate or transfer their interests therein, nor shall said trust, or any of the proceeds thereof, be subject to any claims of creditors, nor may the interests of any such beneficiaries be transferred or made payable to any other person, firm, corporation or entity.

III.

Alleges that this third party defendant is one of the beneficiaries of said trust, and that all of the sums otherwise payable to him under the terms of said trust are necessary for his support within the meaning of §849 of the Code of Civil Procedure of the State of California.

First Defense to Third Party Complaint

I.

Admits that defendant and third party plaintiff claims no right, title or interest in the fund of money here in issue, or any part thereof, and, except as so expressly admitted, denies each and every, all and singular, the remaining allegations contained

in paragraph 8 of the third party complaint of First Western Bank and Trust Company, a California banking corporation.

II.

Denies generally and specifically, each and every, all and singular, the allegations contained in paragraph 9 of the third party complaint, and denies that Richard D. Leuschner is or will be liable to the First Western Bank and Trust Company, a California banking corporation, under any of the circumstances mentioned in said third party complaint, or in any capacity, or for any amount whatsoever.

Second Defense to Third Party Complaint

This answering third party defendant incorporates at this place by reference all of the allegations contained in paragraphs I, II and III of the Third Defense to Plaintiff's Complaint, as hereinabove set forth.

Wherefore, third party defendant Richard D. Leuschner prays that plaintiff United States of America and defendant and third party plaintiff First Western Bank and Trust Company, a California banking corporation, take nothing by their complaint and third party complaint, and that this third party defendant be dismissed with his costs.

Dated: May 29, 1956.

/s/ M. MITCHELL BOURQUIN,

/s/ GEORGE DeLEW,

Attorneys for Third Party Defendant Richard D. Leuschner.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 31, 1956.

[Title of District Court and Cause No. 35398.]

MOTION OF RICHARD D. LEUSCHNER TO
AMEND ANSWER

Richard D. Leuschner, third party defendant and intervenor, moves and applies to the court for an order permitting him to amend his answer to plaintiff's complaint and to the third party complaint of defendant First Western Bank and Trust Company by filing an amendment to said answer, copy of which is attached hereto and by reference made a part hereof. This motion is based upon said amendment and on the records, papers and files in this action, and is made upon the ground that the allowance of said amendment will be in the interests and furtherance of justice.

Dated: February 21, 1957.

/s/ M. MITCHELL BOURQUIN,

/s/ GEORGE DeLEW,

Attorneys for Richard D. Leuschner.

Notice of Motion

To plaintiff United States of America and to Messrs. Lloyd H. Burke, Charles Elmer Collett and Leon Yudkin, its attorneys, and to First Western Bank and Trust Company and to Messrs. Christopher M. Jenks and Orrick, Dahlquist, Herrington & Sutcliffe, its attorneys, and to Erida Leuschner Reichert, and to Messrs. John E. Troxel and Slack and Zook, her attorneys:

Please Take Notice that the undersigned will

bring the above motion on for hearing before the Presiding Judge of this court at Room 258 Post Office Building, San Francisco, California, on Wednesday, the 27th day of February, 1957, at 9:30 A.M. of that day, or as soon thereafter as counsel can be heard. A draft of the Order proposed is attached.

Dated: February 21, 1957.

/s/ M. MITCHELL BOURQUIN,

/s/ GEORGE DeLEW,

Attorneys for Richard D. Leuschner.

[Note: Order Permitting Amendment and Amendment are set out at pages 29-31.]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Feb. 25, 1957.

[Title of District Court and Cause No. 35398.]

ORDER PERMITTING AMENDMENT TO ANSWER OF RICHARD D. LEUSCHNER

Upon the motion of M. Mitchell Bourquin and George DeLew, attorneys for third party defendant and intervenor Richard D. Leuschner in the above entitled action, and good cause appearing therefor,

It Is Hereby Ordered that Richard D. Leuschner is granted leave to amend his answer to plaintiff's complaint and to the third party complaint of defendant by filing an amendment to said answer.

Dated: February 27, 1957.

/s/ **GEORGE B. HARRIS,**
United States District Judge.

[Endorsed]: Filed Feb. 27, 1957.

[Title of District Court and Cause No. 35398.]

**AMENDMENT TO ANSWER OF THIRD
PARTY DEFENDANT RICHARD D. LEU-
SCHNER**

Comes now Richard D. Leuschner, joined herein as third party defendant, and after leave of court first had and obtained files this, an amendment to his answer to plaintiff's complaint and to the third party complaint of defendant First Western Bank and Trust Company, and admits, denies and alleges as follows:

As an additional and fourth defense to the complaint of plaintiff, and as an additional and third defense to the third party complaint, this defendant alleges:

I.

That heretofore, in action No. 8450 on the records of the United States District Court for the Southern District of California, Northern Division, In the Matter of Richard D. Leuschner, Bankrupt, said court adjudicated this defendant a bankrupt. That in said action plaintiff United States of America filed its claim in the amount of \$339,260.63. That thereafter a trustee was duly and regularly ap-

pointed and petitioned said United States District Court to subject to the claims of creditors of this defendant, the aforesaid bankrupt, all of the proceeds of the trust created by Ida Denicke Leuschner, of which trust the First Western Bank and Trust Company is one of three trustees. That in said action said court made its final order refusing to subject said trust income to the payment of creditors' claims, including that of the United States of America, plaintiff herein, and said judgment has now become final. That this defendant alleges that the judgment of the aforesaid court upon the matters and things herein alleged by plaintiff is an adjudication of the issues herein raised and that plaintiff United States of America is estopped from herein asserting any claim to the funds of said trust herein sought, and that said judgment of the United States District Court for the Southern District of California, Northern Division, in the cause aforesaid, is a complete determination of the matters and things here under consideration, and plaintiff United States of America is barred from maintaining this action by reason of said adjudication.

Wherefore this defendant prays that plaintiff and third party plaintiff take nothing by their complaint and third party complaint and that this defendant be dismissed with his costs.

Dated: February 21, 1957.

/s/ M. MITCHELL BOURQUIN,

/s/ GEORGE DeLEW,

Attorneys for Richard D. Leuschner.

[Endorsed]: Filed Feb. 27, 1957.

[Title of District Court and Cause No. 35398.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto by their respective counsel of record, that the facts stated herein shall be taken to be true in the above proceeding and received in evidence therein; it being further stipulated and agreed that this stipulation shall be without prejudice to the right of any party to introduce additional evidence not contrary to or inconsistent with the facts herein stipulated to be true, and without prejudice to the right of any party to object to the materiality or relevance of any of the facts agreed to, which are as follows:

I.

On the dates shown below, the Commissioner of Internal Revenue or his duly authorized delegate assessed against Richard D. Leuschner, Federal Income taxes for the period and in the amounts set forth below. On the dates shown below, the assessment lists containing these assessments were received in the office of the District Director of Internal Revenue at San Francisco, California. Shortly after the receipt of each assessment list, notice and demand for the payment of each tax so assessed was duly made against the taxpayer, but despite the notice and demand for payment the taxpayer has paid, if any, only the amounts set forth below.

PERIOD	DATE OF ASSESSMENT	ASSESSMENT LISTS RECEIVED	AMOUNT OF ASSESSMENT	AMOUNT PAID	NOTICE OF TAX LIEN FILED	UNPAID BALANCE
me	1/4/52	1/ 7/52	\$62,979.84	0	6/ 6/52 7/21/52	\$62,979.84
me	1/4/52	1/ 7/52	66,273.27	0	6/ 6/52 7/21/52	66,273.27
me	1/4/52	1/ 7/52	31,133.54	0	6/ 6/52 7/21/52	31,133.54
me	2/8/52	2/11/52	13,783.74	2,477.21	8/ 7/52	11,306.53

II.

On July 22, 1955 a Notice of Levy (a true copy of which is attached to this stipulation) was delivered to a Trust Office or Assistant Trust Officer of the First Western Bank And Trust Company, San Francisco, California. On April 5, 1956 a Final Demand (a true copy of which is attached to this stipulation) was delivered to a Trust Officer or Assistant Trust Officer of the First Western Bank And Trust Company, San Francisco, California.

III.

On the date of the delivery of the Notice of Levy described above the First Western Bank and Trust Company was and now is one of three co-trustees of a Trust created by Ida Denicke Leuschner. On the date of the delivery of the Notice of Levy described above Richard D. Leuschner was and now is one of the beneficiaries of the Trust created by Ida Denicke Leuschner. In connection with the administration of the aforesaid trust all receipts of income attributable to this trust were deposited in a commercial account containing deposits of trusts being administered in whole or in

part by the First Western Bank and Trust Company. Payments to the beneficiaries of the Leuschner trust were made by checks drawn on this commercial account and signed by an officer of the Trust Department of the First Western Bank and Trust Company.

IV.

Payments to other beneficiaries of the Leuschner trust have been made and are being made in the manner set forth above but no payments have been made from said trust to Richard D. Leuschner since the delivery of the above mentioned Notice of Levy.

V.

The First Western Bank and Trust Company has refused and still refuses to pay any monies to the United States of America under the above mentioned Trust agreement but has been and is now willing to deposit said funds in Court.

VI.

If Richard D. Leuschner were called as a witness in this cause he would testify to the facts as set forth in the Affidavit of Richard D. Leuschner on file in this cause. (a true copy of said affidavit is attached to this stipulation)

Dated March 1, 1957.

LLOYD H. BURKE,
United States Attorney.

/s/ By LYNN J. GILLARD,
Attorneys for the United States.

M. MITCHELL BOURQUIN,

/s/ By GEORGE DeLEW,

Attorneys for Richard D. Leuschner.

CHRISTOPHER M. JENKS,

ORRICK, DAHLQUIST,

HERRINGTON and SUTCLIFFE,

/s/ by CHRISTOPHER M. JENKS,

Attorneys for First Western Bank
and Trust Company.

SLACK and ZOOK,

JOHN E. TROXEL,

/s/ By JOHN E. TROXEL,

Attorneys for Erida L. Reichert.

Form 668-A
REV. JAN. 1935

S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

NOTICE OF LEVY

To: (Name of person holding property, moneys, etc., belonging to taxpayer)
Trust Officer, First Western Bank (Formerly San Francisco Bank) San Francisco, Calif.
Account Trust in which RICHARD D. LEUSCHNER is partial beneficiary.
 You are hereby notified that there is now due, owing, and unpaid from

NAME AND ADDRESS OF TAXPAYER **RICHARD D. LEUSCHNER, Sr., o/o Phillip A. Hershey,**
405 Montgomery St., Rm 1521, San Francisco, California.

to the United States of America the sum of

Two hundred Seven thousand Six hundred Sixty-five & 42/100 Dollars \$ **207,665.42**
 for Internal Revenue taxes, to wit:

PERIOD AND TYPE OF TAX	DATE OF ASSESSMENT	ACCOUNT NO.	UNPAID BALANCE	STATUTORY ADDITIONS	TOTAL
1943 IT XXXXXXXXXX	DAR 1 7 52	#1 4 52 SPL #3 OAP	\$ 62979.84	\$ 13225.77	\$ 76205.61
1944 IT	DAR 1 7 52	#1 4 52 SPL #3 OAP	\$ 66273.27	\$ 13917.39	\$ 80190.66
1945 IT	DAR 1 7 52	#1 4 52 SPL #3 OAP	\$ 31133.54	\$ 6538.04	\$ 37671.58
1947 IT	XXXXXXXXXX 2-11-52	52 FEB 3-519030	\$ 11306.53	\$ 2291.04	\$ 13597.57

Rate of interest 6% per annum.
 Plus statutory interest from 7-15-1955 to date paid. TOTAL AMOUNT DUE \$ **207,665.42**

You are further notified that demand has been made upon the taxpayer for the amount set forth herein, and that such amount is still due, owing, and unpaid from this taxpayer, and that the lien provided for by Section 6321, Internal Revenue Code of 1954, now exists upon all property or rights to property belonging to the aforesaid taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability.

Dated at _____ this _____ day of _____ 19____

DISTRICT DIRECTOR OF INTERNAL REVENUE *Raymond J. Lucchesi* TITLE Collection Officer in Charge. RECEIVED
Glenn T. Jamison Raymond J. Lucchesi
 CERTIFICATE OF SERVICE

I hereby certify that this levy was served by handing a copy of this notice of levy to
 NAME AND TITLE
94 APR 20 1956
DIST. DIRECTOR INTERNAL REVENUE
SAN FRANCISCO

On _____, 195__ at _____ a.m. p.m. COLLECTION OFFICER (Signature)

Received
 MAY 1 1956
 Legal Division

Form 668-C

(REV. JAN. 1955)

U. S. TREASURY DEPARTMENT - INTERNAL

FINAL DEMAND

RECEIVED

DISTRICT

SAN FRANCISCO, CALIFORNIA

DATE

94 MAR 23 1956

TO: Trust Officer, First Western Bank (formerly San Francisco Bank), San Francisco, Calif.
 Trust account in which RICHARD D. LEUSCHNER, Sr., is a partial beneficiary

On July 22, 1955

D. J. Flynn, Asst. Trust Officer

there was served upon you a levy, by leaving with First Western Bank, San Francisco of levy, on all property, rights to property, moneys, credits and bank deposits then in your possession, to the credit of, belonging to, or owned by Richard D. Leuschner, Sr., c/o Phillip Hershey of 450 Montgomery St., Rm 1521, San Francisco, Calif. who was at the time, and still is, indebted to the United States of America for unpaid internal revenue taxes, together with statutory additions which had accrued thereon at the time of levy, and which amounted at that time to the sum of \$ 207,665.42. Demand was made upon you for the amount set forth in the notice of levy, or for such lesser sum as you may have been indebted to the taxpayer, which demand has not been met.

Your attention is invited to the provisions of Section 6332, Internal Revenue Code, which require that you surrender to levy the property, rights to property, moneys, credits and bank deposits then in your possession, to the credit of, belonging to, or owned by Richard D. Leuschner, Sr., c/o Phillip Hershey of 450 Montgomery St., Rm 1521, San Francisco, Calif. who was at the time, and still is, indebted to the United States of America for unpaid internal revenue taxes, together with statutory additions which had accrued thereon at the time of levy, and which amounted at that time to the sum of \$ 207,665.42. Demand was made upon you for the amount set forth in the notice of levy, or for such lesser sum as you may have been indebted to the taxpayer, which demand has not been met.

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty For Violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) Person Defined.—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

Demand is again made for the amount set forth in the notice of levy, \$ 207,665.42, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served. If you comply with this final demand within five days from its service, no action will be taken to enforce the provisions of section 6332 of the Internal Revenue Code. If, however, this demand is not complied with within five days from the date of its service, it will be deemed to be finally refused by you and proceedings may be instituted by the United States as authorized by the statute quoted above.

DISTRICT DIRECTOR OF INTERNAL REVENUE

BY (Signature)

TITLE Collection Officer in Charge, Merced, Calif.
 Designated Representative.

Raymond J. Inocchesi
 CERTIFICATE OF SERVICE

I hereby certify that this Final Demand was served by handing a copy thereof to:

NAME BY: <u>Wm. J. Grogan</u>	TITLE
PLACE <u>San Francisco, Calif.</u>	DATE <u>4-5-56</u>
RECEIVED <u>Raymond J. Inocchesi</u>	TIME <u>11:15 am</u>
DATE <u>4-5-56</u>	

U. S. GOVERNMENT PRINTING OFFICE: 1954 O - 324920

remittance to: Raymond J. Inocchesi, Collection Officer in Charge,
 Designated Representative,
 420 W 18th Street,
 Merced, California.

CERTIFICATE OF ASSESSMENTS AND PAYMENTS

OFFICE OF DISTRICT DIRECTOR OF INTERNAL REVENUE

In re: Richard D. Lemschner, sr. c/o Phillip
(Name of taxpayer)

San Francisco, California

A Hershey 405 Montgomery St. Rm 1521 S.F.
California (Address)

TO THE COMMISSIONER OF INTERNAL REVENUE:

ATTENTION:

F.J. Stuart, Chief, Special Procedures Section
(Refer to symbols and date of letter requesting this certification)

The following is a transcript of the records of this office covering the accounts of the taxpayer named

above in respect to Income Tax

(Character of tax)

for the as indicated below

(Period covered)

1. TAX- ABLE PERIOD	2. LAST AND YEAR	3. ACCT. NO. OR PAGE AND LINE	4. AMOUNT ASSESSED		PAID, ABATED, OR CREDITED		7. PAID AS. CR.	8. ADJUSTMENT OF OVERASSESSMENTS
					5. DATE OR SCHEDULE NO.	6. AMOUNT		
1943	52 Jan-4-Sp-3-04P		43,265	56				OUTSTANDING
	Int		19,714	28				\$62,979.84
23C Assessment list signed 1-4-52								
23C Assessment list received 1-7-52								
First Notice and Demand 1-15-52								
Second Notice and Demand 4-17-52								
Warrant for Distraint 6-6-52								
Liens 6-6-52 and 7-21-52, 7-18-55								
1040 Orig 966715 272 D Int to 10-19-51								
1944	52 Jan-4-Sp-3-06P		47,485	34				
	Int		18,787	93				\$66,273.27
remarks same as above								
orig 6-300695								
1945	52 Jan-4-Sp-3-08P		23,309	52				
	Int		7,824	02				\$31,133.54
remarks same as above.								
orig 9042200								
1947	52 Feb-8-519030		8,872	80				
	Int		4,910	94	IT-175909	2,477	21	cr
1040 9162001, 272 D 292C								
Int to 10-19-51								
First Notice and Demand 2-29-54								
Second Notice and Demand 6-3-52								
Warrant for Distraint 8-7-52								
lien 8-7-52								

[Title of District Court and Cause No. 35398.]

AFFIDAVIT OF RICHARD D. LEUSCHNER

State of California,

City and County of San Francisco—ss.

Richard D. Leuschner, being first duly sworn, deposes and says:

I am a beneficiary of a trust established by Ida Denicke Leuschner on April 16, 1941, which provides for the distribution to me of principal and income in monthly installments. The total annual distributions pursuant to the trust in 1955 were \$7,942.99. My living expenses during that year, on a monthly basis, were as follows:

Food	\$175.00
Milk	10.00
Laundry	32.00
Dental	25.00
Drugs	30.00
Water	18.45
Gas and electricity.....	37.00
Telephone	40.00
Rent	170.00
Firewood	10.00
Clothes	50.00
Insurance	65.00
Travel	70.00
Accounting	20.00

Total\$752.45

For 1956, these expenses will be increased by approximately \$200 per month for medical expenses for my wife. She is suffering from a progressive arthritis which will necessitate constant treatment and medication. A diagnosis of her condition by E. A. Jackson, M. D. is attached hereto and made a part hereof and marked "Exhibit A." It is to be anticipated, in view of my wife's condition, that these expenses will continue and will increase in the near future. In addition, my said wife has had one operation for removal of a malignant cancer and a recurrence can be anticipated.

Because the trust above referred to provides for payments of principal as well as income, the total amount which I receive will diminish each year, and the anticipated total for 1956 is between \$6,000 and \$6,500.

I have no source of income other than the trust above referred to. My age is 53 and I have not been able to obtain a job, though I have made several attempts to obtain employment recently. My wife is without assets or income sufficient for our support.

RICHARD D. LEUSCHNER.

Subscribed and sworn to before me this 17th day of May, 1956.

[Seal] GEORGIA M. JAY,
Notary Public in and for the City and County of
San Francisco, State of California.

EXHIBIT A

[Letterhead of Edward A. Jackson, M.D., F.A.C.S.,
2630 M Street, Merced, California.]

May 15, 1956

Attorney George DeLew
712 Crocker Bldg.
Post & Montgomery Sts.
San Francisco, California

Re: Elizabeth Leuschner

Dear Mr. DeLew:

The above named lady has been a patient of mine for many years. In 1944 while I was in the service a tumor of the breast was removed, but no malignancy was found, so no further treatment was done. In August 1953 a carcinoma of the uterus was found and a total hysterectomy was done, following which deep x-ray therapy was given. So far, there has been no evidence of any recurrence of this carcinoma, but yet, it is too early to be certain.

In January 1956 she reported to me with severe arthritis involving the wrists, fingers, knees, ankles and feet. All the joints were markedly swollen and reddened and extremely painful. She has not shown any cardiac involvement as yet. She is being treated at the present time with large dosages of cortisone and acthar intermuscularly two or three times a week. This treatment will probably be necessary for a long period of time, and she may even become so crippled with this arthritis that it will require hospital treatment.

As you know cortisone and acthar are extremely

expensive when taken over a long period of time. The amount of cortisone that she takes will cost her at least \$50.00 a month besides the cost of the acthar given in the office.

Yours truly,

/s/ EDWARD A. JACKSON

Edward A. Jackson, M. D.

EAJ:MC

State of California,
County of Merced—ss.

On this 17th day of May 1956, before me, the undersigned, a Notary Public in and for said Merced County, personally appeared Edward A. Jackson, M. D. known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same.

Witness my hand and official seal.

PATRICIA A. MELLO,

Notary Public in and for said Merced County and State. My commission expires May 13, 1957.

[Endorsed]: Filed March 8, 1957.

[Title of District Court and Cause No. 35398.]

EXCERPT FROM DOCKET ENTRIES

1956

Apr. 13—Filed complaint and issued summons.

* * * * *

May 3—Filed motion of deft. to bring Richard D. Leuschner and Erida Leuschner Reichert in as 3rd party defts.

1956

May 3—Filed order granting motion to bring in
3rd party defts. (Hamlin)

3—Filed 3rd party complaint & issued sum-
mons.

* * * * *

4—Filed Answer of Deft.

* * * * *

8—Filed answer of Erida Leuschner Reichert
to 3rd party complaint.

8—Filed answer of Erida Leuschner Reichert
to complaint.

8—Filed motion by Richard D. Leuschner to
intervene as deft. May 21, 1956 with
memo., form of order and copy of answer
attached.

* * * * *

21—Filed order granting Richard D. Leusch-
ner leave to intervene. (Murphy)

* * * * *

23—Filed answer of Richard D. Leuschner,
intervener.

May 31—Filed answer of Richard D. Leuschner,
3rd party deft.

* * * * *

Dec. 6—Filed deposition of William O. Hogan.

* * * * *

1957

Feb. 27—Ordered after hearing case consolidated
with 35416 and assigned for trial March
1, 1957 and 3rd party defendant, Leusch-
ner, granted leave to amend answer.
(Harris)

1957

Feb. 27—Filed order granting 3rd party deft. leave to amend answer. (Harris)

27—Filed amendment to answer of 3rd party deft. Richard D. Leuschner.

27—Filed order granting motion of First Western Bank for joint pre-trial hearing and joint trial. (Harris)

Mar. 1—Ord. case cont'd. March 7, 1957 for trial. (Harris)

7—Ord. case assigned to Judge Ritter for trial this date. (Goodman)

Mar. 7—Court trial. Evidence and exhibits introduced, motion of USA to foreclose lien denied and further trial cont'd. to March 8, 1957 at 10 AM. (Ritter)

* * * * *

8—Filed stipulation of facts.

8—Further court trial. Ruled that Richard D. Leuschner has failed in action against First Western Bank and in x-complaint vs. Trustees. Bank not liable to USA under penalty provision and bank allowed atty. fees at prayed. USA no right to foreclose lien. Counsel to prepare findings, conclusions & judgment. (Ritter)

13—Lodged findings of fact and conclusions of law.

13—Lodged judgment.

* * * * *

28—Filed findings & conclusions. (Ritter)

1957

Mar. 28—Entered judgment—filed March 28, 1957
—for plaintiff Richard D. Leuschner in
35416 take nothing and said action is
dism.; United States, plaintiff in 35398
take nothing and action dismiss. First West-
ern Bank & Trust Co. deft. x-complainant
in 35416 and deft-3rd party plttf. in 35398
have judgment of \$3500 atty. fees from
funds on deposit in savings acct. No.
803406 at SF main office of 1st Western
Bank and Trust Co., and Erida Leusch-
ner Reichert, deft. x-deft. & 3rd party
plttf. in 35416 and 3rd party deft. in
35398 recover \$500.00 atty. fees from
funds in account 803406 at SF main office
of 1st Western Bank & Trust Co. (Ritter)

28—Mailed notices.

Apr. 26—Filed notice of appeal by Richard D.
Leuschner.

29—Mailed notices.

26—Filed substitution of C. Ray Robinson as
counsel for Richard D. Leuschner.

29—Filed appeal bond in sum \$250.00.

May 27—Filed notice of appeal by USA.

28—Mailed notices.

28—Filed appellant Leuschner's designation
of record on appeal.

28—Filed statement of points upon which
Leuschner intends to rely on appeal.

28—Filed notice of association of Lewis,
Field, DeGoff and Stein and M. S. Huber-
man as counsel for Leuschner.

1957

May 31—Filed ord. ext. time to docket record on appeal to July 8, 1957. (Murphy)

June 7—Filed reporters transcript of proceedings of trial.

In the United States District Court, Northern
District of California, Southern Division

No. 35416

RICHARD D. LEUSCHNER, Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California banking corporation, and
ERIDA LEUSCHNER REICHERT,
Defendants.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California banking corporation,
Cross-Complainant,

vs.

RICHARD D. LEUSCHNER, ERIDA LEUSCH-
NER REICHERT and UNITED STATES
OF AMERICA, Cross-Defendants.

PETITION FOR REMOVAL

The cross-defendant, United States of America,
by the undersigned, its attorneys, states that:

1. This petition is brought pursuant to Section
1444 of Title 28, U.S.C., which provides:

Any action brought under Section 2410 of this title against the United States in any State court may be removed by the United States to the District Court of the United States for the district and division in which the action is pending.

2. In an action pending in the Superior Court of the State of California, in and for the City and County of San Francisco, bearing the above caption and No. 456519, a cross complaint by the First Western Bank and Trust Company was filed naming the United States as a cross-defendant.

3. The United States is named a cross-defendant and was served with a copy of the cross-complaint pursuant to the provisions of Section 2410 of Title 28, U.S.C.

4. A copy of the summons and cross-complaint was received by the United States Attorney on April 9, 1956 and copies thereof are attached hereto.

Wherefore, the cross-defendant, the United States of America, prays that this action be removed to this court.

LLOYD H. BURKE,
United States Attorney,

/s/ By LYNN J. GILLARD,
Assistant United States Attorney.

Duly Verified.

Affidavit of Service by Mail Attached.

DEFENDANTS' EXHIBIT "B"

In the Superior Court of the State of California in
and for the City and County of San Francisco

No. 456519

Richard D. Leuschner, Plaintiff, vs. First Western
Bank and Trust Company, a California bank-
ing corporation, and Erida Leuschner Reichert,
Defendants.

First Western Bank and Trust Company, a Cali-
fornia banking corporation, Cross-Complainant,
vs. Richard D. Leuschner, Erida Leuschner
Reichert and United States of America, Cross-
Defendants.

SUMMONS

The People of the State of California Send Greet-
ing to: Richard D. Leuschner, Erida Leuschner
Reichert and United States of America, Cross-
Defendants.

You Are Hereby Directed to appear and answer
the cross-complaint in the action entitled as above
brought against you in the Superior Court of the
State of California, in and for the City and County
of San Francisco, within ten days after the service
on you of this summons—if served within this City
and County; or within thirty days if served else-
where; provided, however, that cross-defendant
United States of America, as set forth in Section
2410 of Title 28 of the United States Code, may

Defendants' Exhibit "B"—(Continued)

appear and answer, plead or demur to said cross-complaint within sixty days after such service.

And you are hereby notified that unless you appear and answer as above required, the said cross-complainant will take judgment for any money or damages demanded in the cross-complaint as arising upon contract or will apply to the Court for any other relief demanded in the cross-complaint.

Given under my hand and seal of the Superior Court of the City and County of San Francisco, State of California.

Dated: Apr. 9, 1956.

[Seal] MARTIN MONGAN, Clerk,
By R. F. LIPPI,
Deputy Clerk.

[Title of Superior Court and Cause No. 456519.]

CROSS-COMPLAINT

First Western Bank and Trust Company, as cross-complainant herein, by leave of court first had and obtained, complains of the above named cross-defendants and for a cause of action alleges:

I.

Cross-complainant is and at all times herein mentioned was a banking corporation duly organized and existing under the laws of the State of California and having its principal place of business in the City and County of San Francisco, State of California. For many years prior to the 9th day of No-

Defendants' Exhibit "B"—(Continued)

vember, 1954, the name of cross-complainant was The San Francisco Bank, but by proceedings duly had, its name was on said 9th day of November, 1954, charged to First Western Bank and Trust Company and its name ever since has been and is now First Western Bank and Trust Company.

II.

Cross-complainant, cross-defendant Richard D. Leuschner and cross-defendant Erida Leuschner Reichert are trustees of a trust created by one Ida Denicke Leuschner in an Agreement of Trust dated the 16th day of April, 1941. Cross-defendant Richard D. Leuschner and cross-defendant Erida Leuschner Reichert are also beneficiaries of said trust, and as such are entitled to receive certain monthly payments of income and principal therefrom.

III.

Cross-complainant as one of said trustees held in its possession as of the time of the filing of the complaint herein a fund in the amount of \$6,991.65 and now holds in its possession a fund in the amount of \$7,462.89, which fund is claimed by cross-defendant Richard D. Leuschner as beneficiary of said trust and is also claimed by cross-defendant United States of America under and pursuant to a notice of levy served on cross-complainant on the 22nd day of July, 1955, for taxes alleged to be due to said United States of America from cross-defendant Richard D. Leusch-

Defendants' Exhibit "B"—(Continued)

ner in the amount of \$207,665.42 with interest at the rate of 6% per annum from July 15, 1955, which claims have been made against cross-complainant without collusion with cross-complainant. Said respective claims of said cross-defendants are adverse to each other and cross-complainant cannot safely determine for itself which claim is right and lawful. Cross-complainant has no interest in said fund or any part thereof except to be discharged from liability therefor and is ready, able and willing to deliver said fund to the person or persons entitled thereto or to deposit the same with this court, and to do any and all things with reference thereto as this court may order.

IV.

Cross-defendant Erida Leuschner Reichert may claim some right, title or interest in said fund or some part thereof as trustee or otherwise, but the nature and extent of any such claim by said cross-defendant is unknown to cross-complainant.

V.

Cross-complainant is informed and believes and upon such information and belief alleges that there is reasonable doubt in law and in fact as to which of said adverse claimants is entitled to receive said fund or some portion thereof, and cross-complainant has no speedy or adequate remedy at law in the premises.

Wherefore, cross-complainant prays that cross-

Defendants' Exhibit "B"—(Continued)
defendants and each of them litigate their respective claims to said fund among themselves, and prays that this court:

1. Determine the costs of suit, including reasonable attorneys' fees to be allowed cross-complainant from said fund;

2. Direct cross-complainant to deposit the balance of said fund with this court;

3. Discharge cross-complainant from any and all liability in connection with said fund to cross-defendants or any of them; and

4. Grant cross-complainant such other and further relief as may be proper.

Dated: April 6, 1956.

ORRICK, DAHLQUIST,
HERRINGTON & SUTCLIFFE,
Attorneys for Defendant and Cross-Complainant,
First Western Bank and Trust Company.

Duly Verified.

[Endorsed]: Exhibit B Filed April 9, 1956. Martin Mangan, Clerk, by R. F. Lippi, Deputy.

[Endorsed]: Filed April 24, 1956. C. W. Calbreath, Clerk.

[Title of District Court and Cause No. 35416.]

MOTION TO BRING IN THIRD-PARTY
DEFENDANT

Erida Leuschner Reichert, one of the defendants above named, moves for leave to make United States of America a party to this action as the same applies to the said defendant, and that there be served upon said United States of America summons and third-party complaint as set forth in Exhibit A hereto attached.

SLACK & ZOOK,
JOHN E. TROXEL,

/s/ By JOHN E. TROXEL,
Attorneys for Defendant, Erida
Leuschner Reichert.

Notice of Motion

To M. Mitchell Bourquin, Esq., and George De
Lew, Esq., Attorneys for Plaintiff Richard D.
Leuschner:

Please take notice that the undersigned will bring the above motion on for hearing before this Court, Room 256 Post Office Building, 7th and Mission Streets, San Francisco, California, on the 7th day of May, 1956, at 9:30 A.M. of the said day, or as soon thereafter as counsel can be heard.

SLACK AND ZOOK,
JOHN E. TROXEL,

/s/ By JOHN E. TROXEL,
Attorneys for Defendant, Erida
Leuschner Reichert.

[Note: Exhibit A—Third Party Complaint is set out at pages 58-61.]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 30, 1956.

[Title of District Court and Cause No. 35416.]

ORDER GRANTING MOTION TO BRING
IN THIRD PARTY DEFENDANT

Upon reading the motion of Erida Leuschner Reichert to bring in the United States of America as a third party defendant and it appearing to the court that the said United States of America is a necessary party, if complete relief is to be accorded herein and should be joined herein as a third party defendant.

It Is Hereby Ordered, Adjudged and Decreed that the said motion be and the same is hereby granted that said United States of America be and it is hereby made a party to this action and that there be served upon it summons and third party complaint as set forth in Exhibit A attached to said motion.

Dated: May 9th, 1956.

/s/ O. D. HAMLIN,

Judge of the U. S. District Court.

[Endorsed]: Filed May 9, 1956.

[Title of District Court and Cause No. 35416.]

ANSWER OF CROSS-DEFENDANT RICH-
ARD D. LEUSCHNER TO CROSS-COM-
PLAINT

Comes now Richard D. Leuschner, plaintiff and one of the cross-defendants in the above entitled action, and, answering the cross-complaint on file herein, admits, denies and alleges as follows:

I.

Answering the allegations contained in paragraph III of said cross-complaint, this answering defendant denies that cross-complainant First Western Bank and Trust Company, a California banking corporation, cannot determine for itself the adverse claims to the funds in possession of cross-complainant, as trustee, as alleged in said cross-complaint, and alleges that cross-defendant Richard D. Leuschner is solely entitled to the sums mentioned in said paragraph. Denies that cross-complainant has no interest in said sums of money, and alleges that cross-complainant has an interest therein as trustee and, by the terms of the trust agreement referred to in paragraph II of said cross-complaint, is obligated to pay said sums to Richard D. Leuschner and to no one else, and that its failure to pay said sums, as in said trust agreement provided, is a breach of its fiduciary relationship with this answering cross-defendant.

II.

Answering the allegations contained in paragraph IV of the cross-complaint on file herein, this an-

swering cross-defendant admits that Erida Leuschner Reichert has an interest, as trustee, in the sums of money referred to in paragraph III of the cross-complaint hereinabove referred to, and alleges that said Erida Leuschner Reichert has an interest therein as trustee and that, by the terms of the trust agreement referred to in paragraph II of said cross-complaint, her obligation as trustee is to pay said sums to Richard D. Leuschner and to no one else, and that her failure to pay said sums as in said trust agreement provided is a breach of her fiduciary relationship with this answering cross-defendant. Except as herein expressly admitted, this answering cross-defendant denies each and every, all and singular, the remaining allegations contained in paragraph IV of said cross-complaint.

III.

Answering the allegations contained in paragraph V of the said cross-complaint, this answering cross-defendant denies each and every, all and singular, the allegations contained therein. Alleges that this answering cross-defendant is entitled to all of the funds now held by cross-complainant in its capacity as trustee under the terms of the trust referred to in paragraph II of the cross-complaint.

As a further, separate and distinct defense to said cross-complaint, cross-defendant Richard D. Leuschner alleges:

I.

That cross-complainant is now, and at all times mentioned herein has been, trustee of a trust created by Ida Denicke Leuschner, which trust pro-

vides for the receipt of rents and profits within the meaning of § 859 of the Civil Code of the State of California; that cross-complainant has in its possession, as one of said trustees, the sum of \$7,462.89 which, by the terms of the trust, is now due and owing to cross-defendant Richard D. Leuschner.

II.

That this entire sum is necessary for the support of cross-defendant Richard D. Leuschner within the meaning of § 859 of the Civil Code of the State of California. That all sums subsequently accruing under said trust are now and will be necessary for the support of cross-defendant Richard D. Leuschner; that neither the United States, nor any other person, has any interest in said sums now due or to become due cross-defendant Richard D. Leuschner, and that cross-complainant holds the sum of \$7,462.89 without any right whatsoever.

Wherefore, cross-defendant Richard D. Leuschner prays that cross-complainant take nothing by its cross-complaint and that this cross-defendant have judgment against cross-complainant and the cross-defendants other than this cross-defendant for the sum of \$7,462.89 and his costs of court, and for such other relief as to the court may seem meet.

/s/ M. MITCHELL BOURQUIN,

/s/ GEORGE DeLEW,

Attorneys for Plaintiff and Cross-defendant Richard D. Leuschner.

Duly Verified.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed May 1, 1956.

In the District Court of the United States, Northern District of California, Southern Division

Civil Action No. 35416

Richard D. Leuschner, Plaintiff, vs. First Western Bank and Trust Company, a California banking corporation, and Erida Leuschner Reichert, Defendants.

First Western Bank and Trust Company, a California banking corporation, Cross-complainant, vs. Richard D. Leuschner, Erida Leuschner Reichert, and United States of America, Cross-defendants.

Erida Leuschner Reichert, Defendant and third-party Plaintiff, vs. United States of America, Third-party Defendant.

THIRD PARTY COMPLAINT

Erida Leuschner Reichert, as third-party plaintiff herein, by leave of Court first had and obtained, complains of the above named United States of America, and for a cause of action alleges:

I.

The above named Richard D. Leuschner, as plaintiff in the original action commenced in the Superior Court of the State of California, in and for the City and County of San Francisco, filed against the third party plaintiff and the above named First Western Bank and Trust Company, his complaint

against them as co-trustees with the said Richard D. Leuschner of that certain trust created by one Ida Denicke Leuschner in an Agreement of Trust dated April 16, 1941. The said Richard D. Leuschner and third-party plaintiff are also beneficiaries of the said trust, and as such are entitled to receive certain monthly payments of income and principal therefrom.

II.

Third-party plaintiff, as one of the said trustees, had in her possession at the time of the filing of the said complaint, a fund in the amount of \$6,991.65, and now holds, as such trustee, a fund in the approximate amount of \$7,462.89, which said fund is claimed by the said Richard D. Leuschner as beneficiary of the said trust, and is also claimed by third-party defendant United States of America under and pursuant to a notice of levy served on the said First Western Bank and Trust Company on July 22, 1955, for certain taxes alleged to be due to said United States of America from said Richard D. Leuschner in the amount of \$207,665.42 with interest at the rate of 6% per annum from July 15, 1955, which claims have been made against third-party plaintiff without collusion with third-party plaintiff. The said respective claims of the said Richard D. Leuschner and the said United States of America are adverse to each other and third-party plaintiff cannot safely determine for herself which claim is right and lawful. Third-party plaintiff, as an individual, has no interest in the said fund or any part thereof, except to be discharged

from liability therefor, and, as such trustee, is ready, able and willing to deliver the said fund to the person, persons or institutions which are properly entitled thereto, or to deposit the same with this Court, and to do any and all things with reference thereto as this Court may order.

III.

The said United States of America has already been joined as a cross-defendant by third-party plaintiff's co-trustee, First Western Bank and Trust Company, as to the interest of that trustee in the said fund, and all parties have been served with copies of the various complaints and documents herein referred to.

Wherefore, third-party plaintiff prays that the said Richard D. Leuschner, already a party hereto, and said third-party defendant, and each of them, be required to litigate their respective claims to the said fund between themselves, and pray that this Court:

1. Determine the costs of suit, including costs of suit incurred in the State Court prior to removal to the cause therefrom and reasonable attorneys' fees to be allowed third-party plaintiff from the said fund;
2. Direct third-party plaintiff, as such trustee, to deposit the balance of the said funds with this Court;
3. Discharge third-party plaintiff from any and

all liability in connection with the said fund to the said third-party defendant and the said Richard D. Leuschner, or either of them; and

4. Grant third-party plaintiff such other and further relief as may be proper.

SLACK & ZOOK,
JOHN E. TROXEL,

/s/ By JOHN E. TROXEL,
Attorneys for third-party Plaintiff Erida Leusch-
ner Reichert.

[Endorsed]: Filed May 8, 1956.

[Title of District Court and Cause No. 35416.]

ANSWER OF THE UNITED STATES OF
AMERICA TO THIRD PARTY COM-
PLAINT

The United State of America by the undersigned, its attorneys, for its answer to the third party complaint of Erida Leuschner Reichert:

I.

Admits the allegations contained in paragraph I, except that the rights of Richard D. Leuschner to receive any money from the trust are subject to the rights of the United States hereinafter referred to.

II.

Denies any knowledge or information sufficient

to form a belief as to each and every allegation in paragraph II, except admits that the United States of America served a notice of levy upon the First Western Bank and Trust Company as alleged, and has a claim pursuant to such levy as well as the tax liens set forth below, and specifically denies the allegation that the plaintiff could not safely determine whether compliance with the levy should be made.

III.

Admits the allegations contained in paragraph III, except denies jurisdiction over the United States of America.

First Separate and Affirmative Defense.

The complaint fails to state a claim against the defendant United States upon which relief can be granted.

Second Separate and Affirmative Defense.

The United States has not consented to be sued in this form of action and, therefore, this court lacks jurisdiction over the United States as a defendant.

Third Separate and Affirmative Defense.

All right, title and interest of Richard D. Leuschner in and to any property of any sort, including any trust or any proceeds thereof is subject to the tax liens of the United States based upon assessments duly made for income taxes for the years 1943, 1944, 1945, and 1947, as follows:

1943, assessment list received January 7, 1952, in the amount of \$62,979.84, plus interest as provided by law.

1944, assessment list received January 7, 1952, in the amount of \$66,273.27, plus interest as provided by law.

1945, assessment list received January 7, 1952, in the amount of \$31,133.54, plus interest as provided by law.

1947, assessment list received February 11, 1952, in the amount of \$11,306.53, plus interest as provided by law.

These amounts although duly demanded are unpaid.

Notices of tax liens were duly filed in San Francisco County on June 23, 1952, covering the first three years referred to above, and on September 19, 1952, covering the last year referred to above, and in Merced County, California, on July 21, 1952, covering the first three years referred to above and on September 24, 1952, covering the last year mentioned above.

Wherefore, defendant prays

1. That the complaint herein be dismissed.

2. In the alternative, in the event it is determined that the court has jurisdiction that all monies or other property due Richard D. Leuschner from the trust herein, or held by or in the control of any other party, be ordered paid over to the United States of America pursuant to the tax liens.

3. That the interest of Richard D. Leuschner in the trust herein, to the extent of the tax liens, be declared to be payable to the United States of America, and that the trustees of the trust herein be ordered to pay all payments and distributions under the trust as would have gone to Richard D. Leuschner, to the United States of America until the amounts outstanding on its liens are fully paid.

4. For such other and further relief as may be proper.

LLOYD H. BURKE,

United States Attorney,

/s/ By CHARLES ELMER COLLETT,

Assistant United States Attorney,

/s/ LEON YUDKIN,

Special Assistant to the Regional Counsel, Internal Revenue Service.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 22, 1956.

[Title of District Court and Cause No. 35416.]

ANSWER OF THE UNITED STATES OF AMERICA TO CROSS-COMPLAINT

The United States of America by the undersigned, its attorneys, for its answer to the cross-complaint of the First Western Bank and Trust Company,

I.

Admits the allegations contained in paragraph I.

II.

Admits the allegations contained in paragraph II of the complaint, except that the rights of Richard D. Leuschner to receive certain monthly payments of income and principal, are subject to the rights of the United States as more fully set forth herein.

III.

Admits the allegations contained in paragraph III of the complaint, except denies any knowledge or information sufficient to form a belief as to the amounts of money held by the cross-complainant and in what capacity and denies that "cross-complainant cannot safely determine for itself which claim is right and lawful." In further answer to paragraph III, the United States alleges that the basis of its claim is not limited to the levy referred to therein.

IV.

Denies any knowledge or information sufficient to form a belief as to the allegations in paragraph IV.

V.

Denies the allegations contained in paragraph V.

First Separate and Affirmative Defense.

The complaint fails to state a claim against the defendant United States upon which relief can be granted.

Second Separate and Affirmative Defense.

The United States has not consented to be sued in this form of action and, therefore, this court

lacks jurisdiction over the United States as a defendant.

Third Separate and Affirmative Defense.

All right, title and interest of Richard D. Leuschner in and to any property of any sort, including any trust or any proceeds thereof is subject to the tax liens of the United States based upon assessments duly made for income taxes for the years 1943, 1944, 1945, and 1947, as follows:

1943, assessment list received January 7, 1952, in the amount of \$62,979.84, plus interest as provided by law.

1944, assessment list received January 7, 1952, in the amount of \$66,273.27, plus interest as provided by law.

1945, assessment list received January 7, 1952, in the amount of \$31,133.54, plus interest as provided by law.

1947, assessment list received February 11, 1952, in the amount of \$11,306.53, plus interest as provided by law.

These amounts although duly demanded are unpaid.

Notices of tax liens were duly filed in San Francisco County on June 23, 1952, covering the first three years referred to above, and on September 19, 1952, covering the last year referred to above, and in Merced County, California, on July 21, 1952, covering the first three years referred to above and on September 24, 1952, covering the last year mentioned above.

Wherefore, defendant prays

1. That the complaint herein be dismissed.

2. In the alternative, in the event it is determined that the court has jurisdiction, that all monies or other property due Richard D. Leuschner from the trust herein, or held by or in the control of any other party, be ordered paid over to the United States of America pursuant to the tax liens.

3. That the interest of Richard D. Leuschner in the trust herein, to the extent of the tax liens, be declared to be payable to the United States of America, and that the trustees of the trust herein be ordered to pay all payments and distributions under the trust as would have gone to Richard D. Leuschner, to the United States of America until the amounts outstanding on its liens are fully paid.

4. For such other and further relief as may be proper.

LLOYD H. BURKE,

United States Attorney,

/s/ By CHARLES ELMER COLLETT,

Assistant United States Attorney,

/s/ LEON YUDKIN,

Special Assistant to the Regional Counsel, Internal
Revenue Service.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 22, 1956.

In The United States District Court, Northern
District of California, Southern Division

No. 35416

RICHARD D. LEUSCHNER, Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California banking corporation, and
ERIDA LEUSCHNER REICHERT,
Defendants.

No. 35398

UNITED STATES OF AMERICA, Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California banking corporation,
Defendant.

ORDER FOR JOINT PRE-TRIAL HEARING
AND JOINT TRIAL

Upon the motion of Christopher M. Jenks and
Orrick, Dahlquist, Herrington & Sutcliffe, attor-
neys for First Western Bank and Trust Company,
defendant and cross-complainant in Action No.
35416, defendant and third party plaintiff in Action
No. 35398, and good cause appearing therefor,

It Is Hereby Ordered that the two above entitled cases be and they are hereby consolidated for the purpose of a pre-trial hearing and joint trial on all matters involved in both of said cases, and

It Is Further Ordered that signed copies of this Order be filed in both of said cases.

Dated: February 27, 1957.

/s/ GEO. B. HARRIS,

United States District Judge.

[Endorsed]: Filed Feb. 27, 1957.

[Title of District Court and Causes No. 35416 and 35398.]

OBJECTIONS BY UNITED STATES OF
AMERICA TO PROPOSED FINDINGS OF
FACT AND REQUEST FOR ADDITIONAL
FINDINGS OF FACT

Comes now, the United States of America by its attorneys, Lloyd H. Burke, United States Attorney, Charles Elmer Collett, Assistant United States Attorney, and Leon Yudkin & Godfrey L. Munter, Jr., Attorneys, Office of Regional Counsel, Internal Revenue Service, and objects to the proposed findings of fact and conclusions of law heretofore filed in this action by the attorneys for the First Western Bank and Trust Company as follows:

I.

Objects to proposed finding "2.a." which provides as follows:

“On July 22, 1955, when the Notice of Levy was received by First Western Bank and Trust Company, none of the income or corpus of the aforesaid trust was due to Richard D. Leuschner as a beneficiary thereof.”

and requests that in lieu thereof, the Court make the following finding:

On July 22, 1955, when the Notice of Levy was received by the First Western Bank and Trust Company, Richard D. Leuschner, as a beneficiary of the aforesaid trust, had due him a 40% interest in the income of the trust, but such amount was not payable until the last banking day of the month.

The requested finding makes a distinction between the terms “due” and “payable” that is not made clear in the bank’s proposed findings. Under the terms of the trust agreement (paragraph II) it is clear that Richard D. Leuschner had due him as a beneficiary of the trust, 40% of the current income even though such amounts were not payable until the end of the month (see paragraph II of the trust agreement.) This distinction was recognized by the Court when it indicated the basis of its decision. (Transcript (March 8, 1957) page 44, lines 9 and 10.)

II.

Objects to proposed finding “2.b.” which provides as follows:

“The final demand received by First Western Bank and Trust Company on April 5, 1956, did not apply to any money which became due to

Richard D. Leuschner as a beneficiary of said trust after July 22, 1955, when the Notice of Levy was received by First Western Bank and Trust Company."

and requests that in lieu thereof, the Court make the following finding:

The final demand received by First Western Bank and Trust Company on April 5, 1956, referred to the levy served on the First Western Bank and Trust Company on July 22, 1955, and was effective only to the same extent that the levy was effective.

III.

Objects to proposed finding "2.c." which provides as follows:

"It was not the intent of Congress in enacting Section 6332 of the Internal Revenue Code to impose a penalty on a bank or other stakeholder which has failed to respond to a final demand under the circumstances involved herein."

and requests the Court to make in lieu thereof, the following finding:

The First Western Bank and Trust Company is not subject to liability under Section 6332 of the Internal Revenue Code for failure to respond to the levy served upon them by the Internal Revenue Service.

The requested finding limits itself to the basis of the Court's decision as set forth on page 44 of the transcript. Further, the bank's proposed finding

speaks of a final demand, whereas Section 6332 speaks of a failure to honor a levy.

IV.

Objects to proposed finding "2.e." which provides as follows:

"The Answer filed by the United States of America to the cross-complaint of First Western Bank and Trust Company in civil action No. 35416 does not state a claim for foreclosure of any lien which the United States of America may have on the interest of Richard D. Leuschner as a beneficiary of said trust."

on the ground that said finding is contrary to the evidence. The cross-complaint of the First Western Bank and Trust Company is one in interpleader, requiring the United States to come forth and state its claim to the funds in question. This, the United States did, expressly stating that it was claiming the funds by virtue of its Federal tax liens in addition to its rights to the fund under the aforementioned levy. Admittedly, the word "foreclosure" was not used, but the facts sufficient to justify relief were pleaded and the prayer made it clear what relief was being sought albeit inartistically. Should this objection be sustained, item 4 of paragraph VIII herein should be eliminated.

V.

Objects to proposed finding "2.g." which provides as follows:

"First Western Bank and Trust Company

and Erida Leuschner Reichert, as trustees of said trust, are entitled to reimbursement in the amounts of \$3,500.00 and \$500.00 respectively, as reasonable attorneys' fees incurred in connection with the controversy involved in this litigation and are entitled to such reimbursement from funds on deposit in Savings Account No. 803406 at the San Francisco main office of First Western Bank and Trust Company."

on the ground that this is a conclusion of law. It would seem clear that a finding on the subject matter involved would have to contain findings of what reasonable attorneys' fees were, and that they were in fact incurred and that the parties are entitled to them under the interpleader statute or the trust instrument or whatever the basis for their allowance might have been.

VI.

Since the proposed findings do not settle the disposition of the cross-complaint in interpleader filed by the First Western Bank and Trust Company, nor the third-party complaint filed by Erida Leuschner Reichert, it is requested that the Court make the following additional findings of fact:

a. That in action No. 35416, the Court has jurisdiction of the parties thereto and the subject matter therein.

b. That the cross-complaint in interpleader filed by the First Western Bank and Trust Company in action No. 35416, states a good cause of action in interpleader and was properly filed by the First

Western Bank and Trust Company. The defendants in interpleader, each filed their answers setting forth their respective claims to the interpleader funds.

c. That in action No. 35398, the Court has jurisdiction of the parties thereto and the subject matter therein.

d. That the levy served on the First Western Bank and Trust Company was adequate to take and seize the beneficial interest of Richard D. Leuschner in the trust created by Ida Denicke Leuschner. (Transcript page 30.)

VII.

Objection is made to proposed conclusions of law 3 and 4 on the ground that there are no findings of fact to support such conclusions of law.

VIII.

It is respectfully requested that the Court make the following additional conclusions of law.

1. The cross-complaint in interpleader filed by the First Western Bank and Trust Company in action No. 35416 was a good and sufficient interpleader.

2. The Notice of Levy served by the United States of America on the First Western Bank and Trust Company on July 22, 1955, was a good and sufficient levy and was effective to seize the beneficial interest of Richard D. Leuschner in the trust created by Ida Denicke Leuschner.

3. The third-party complaint filed by Ida Den-

icke Leuschner in action No. 35416 is dismissed with prejudice.

4. The cross-complaint in interpleader filed by the First Western Bank and Trust Company is dismissed with prejudice. (This last item subject to IV above.)

LLOYD H. BURKE,

United States Attorney,

/s/ By CHARLES ELMER COLLETT,

Assistant United States Attorney,

LEON YUDKIN &

GODFREY L. MUNTER, JR.,

Attorneys, Office of Regional Counsel, Internal Revenue Service,

/s/ By LEON YUDKIN,

Attorneys for the United States of America.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 18, 1957.

[Title of District Court and Causes Nos. 35416 & 35398.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cases, heretofore consolidated for trial, came on regularly for trial on March 7, 1957, and the court having considered the evidence, including the Stipulation of Facts filed herein,

makes the following findings of fact and conclusions of law:

Findings of Fact

1. The court finds, in accordance with the Stipulation of Facts:

a. On the dates shown below, the Commissioner of Internal Revenue or his duly authorized delegate assessed against Richard D. Leuschner, Federal Income taxes for the period and in the amounts set forth below. On the dates shown below, the assessments lists containing these assessments were received in the office of the District Director of Internal Revenue at San Francisco, California. Shortly after the receipts of each assessment list, notice and demand for the payment of each tax so assessed was duly made against the taxpayer, but despite the notice and demand for payment the taxpayer has paid, if any, only the amount set forth below.

NATURE OF TAX & PERIOD	DATE OF ASSESSMENT	ASSESSMENT LISTS RECEIVED	AMOUNT OF ASSESSMENT	AMOUNT PAID	NOTICE OF TAX LIEN FILED	UNPAID BALANCE
Income 1943	1/4/52	1/ 7/52	\$62,979.84	0	6/ 6/52 7/21/52	\$62,979.84
Income 1944	1/4/52	1/ 7/52	66,273.27	0	6/ 6/52 7/21/52	66,273.27
Income 1945	1/4/52	1/ 7/52	31,133.54	0	6/ 6/52 7/21/52	31,133.54
Income	2/8/52	2/11/52	13,783.74	2,477.21	8/ 7/52	11,306.53

b. On July 22, 1955 a Notice of Levy (a true copy of which is attached to said Stipulation of Facts) was delivered to a Trust Officer or Assistant Trust Officer of the First Western Bank and Trust Company, San Francisco, California. On April 5, 1956 a Final Demand (a true copy of which is at-

tached to said Stipulation of Facts) was delivered to a Trust Officer or Assistant Trust Officer of the First Western Bank and Trust Company, San Francisco, California.

c. On the date of the delivery of the Notice of Levy described above the First Western Bank and Trust Company was and now is one of three co-trustees of a Trust created by Ida Denicke Leuschner. On the date of the delivery of the Notice of Levy described above Richard D. Leuschner was and now is one of the beneficiaries of the Trust created by Ida Denicke Leuschner. In connection with the administration of the aforesaid trust all receipts of income attributable to this trust were deposited in a commercial account containing deposits of trusts being administered in whole or in part by the First Western Bank and Trust Company. Payments to the beneficiaries of the Leuschner trust were made by checks drawn on this commercial account and signed by an officer of the Trust Department of the First Western Bank and Trust Company.

d. Payments to other beneficiaries of the Leuschner trust have been made and are being made in the manner set forth above but no payments have been made from said trust to Richard D. Leuschner since the delivery of the above mentioned Notice of Levy.

e. The First Western Bank and Trust Company has refused and still refuses to pay any monies to the United States of America under the above

mentioned Trust agreement but has been and is now willing to deposit said funds in court.

2. The court further finds:

a. On July 22, 1955, when the Notice of Levy was received by First Western Bank and Trust Company, none of the income or corpus of the aforesaid trust was due to Richard D. Leuschner as a beneficiary thereof.

b. The Final Demand received by First Western Bank and Trust Company on April 5, 1956 did not apply to any money which became due to Richard D. Leuschner as a beneficiary of said trust after July 22, 1955, when the Notice of Levy was received by First Western Bank and Trust Company.

c. It was not the intent of Congress in enacting Section 6332 of the Internal Revenue Code to impose a penalty on a bank or other stakeholder which has failed to respond to a final demand under the circumstances involved herein.

d. First Western Bank and Trust Company, Erida Leuchner Reichert and Richard D. Leuschner were on July 22, 1955, at all times since have been and now are the trustees under said Agreement of Trust, and no Notice of Levy or Final Demand in connection with the taxes involved herein was served upon or delivered to Erida Leuschner Reichert or Richard D. Leuschner as such trustees.

e. The right of the United States of America to collect unpaid income taxes from Richard D. Leuschner must prevail over the "spendthrift" pro-

visions of the Agreement of Trust, a copy of which is attached to the complaint in Civil Action No. 35416 and therefore it is unnecessary to determine whether the sum of \$750 per month which Richard D. Leuschner testified was necessary for his support, or any other sum, is necessary therefor within the meaning of Section 859 of the Civil Code of the State of California.

f. The answer filed by the United States of America to the cross-complaint of First Western Bank and Trust Company in Civil Action No. 35416 does not state a claim for foreclosure of any lien which the United States of America may have on the interest of Richard D. Leuschner as a beneficiary of said trust.

g. First Western Bank and Trust Company and Erida Leuschner Reichert as trustees of said trust are entitled to reimbursement in the amounts of \$3,500 and \$500, respectively, as reasonable attorneys' fees incurred in connection with the controversy involved in this litigation and are entitled to such reimbursement from funds on deposit in Savings Account No. 803406 at the San Francisco Main Office of First Western Bank and Trust Company.

Conclusions of Law

1. Civil Action No. 35416 filed by Richard D. Leuschner as plaintiff must be dismissed.

2. Civil Action No. 35398 filed by the United States of America as plaintiff must be dismissed.

3. First Western Bank and Trust Company as trustee under the aforesaid Agreement of Trust is entitled to judgment in the sum of \$3,500 as attorneys' fees incurred in connection with the controversy involved in this litigation, said sum to be paid from funds on deposit in Savings Account No. 803406 at the San Francisco Main Office of First Western Bank and Trust Company.

4. Erida Leuschner Reichert as trustee under the aforesaid Agreement of Trust is entitled to judgment in the sum of \$500 as attorneys' fees incurred in connection with the controversy involved in this litigation, said sum to be paid from funds on deposit in Savings Account No. 803406 at the San Francisco Main Office of First Western Bank and Trust Company.

Dated: March 28, 1957.

/s/ WILLIS W. RITTER,
United States District Judge.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 28, 1957.

In the United States District Court, Northern
Division of California, Southern Division

No. 35416

RICHARD D. LEUSCHNER, Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California banking corporation, and
ERIDA LEUSCHNER REICHERT,
Defendants.

No. 35398

UNITED STATES OF AMERICA, Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California banking corporation,
Defendant.

JUDGMENT

The above entitled cases, heretofore, consolidated for trial, came on regularly for trial on March 7, 1957 before the Court (a jury having been waived), all parties being represented by counsel, and the Court having made findings of fact and conclusions of law,

It Is Hereby ordered, adjudged and decreed that Richard D. Leuschner, plaintiff in Civil Action No.

35416, take nothing in said action and the same is hereby dismissed on the merits; and

It Is Further Ordered, Adjudged and Decreed that the United States of America, plaintiff in Civil Action No. 35398, take nothing in said action and the same is hereby dismissed on the merits; and

It Is Further Ordered, Adjudged and Decreed that First Western Bank and Trust Company, defendant and cross-complainant in Civil Action No. 35416, defendant and third party plaintiff in Civil Action No. 35398, have and recover the sum of \$3,500 as attorneys' fees from the funds on deposit in Savings Account No. 803406 at the San Francisco Main Office of First Western Bank and Trust Company; and

It Is Further Ordered, Adjudged and Decreed that Erida Leuschner Reichert, defendant, cross-defendant and third party plaintiff in Civil Action No. 35416, and third party defendant in Civil Action No. 35398, have and recover the sum of \$500 as attorneys' fees from the funds on deposit in Savings Account No. 803406 at the San Francisco Main Office of First Western Bank and Trust Company.

Dated: March 28, 1957.

/s/ WILLIS W. RITTER,

United States District Judge.

Entered in Civil Docket 3/28/57.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 28, 1957.

[Title of District Court and Causes Nos. 35398 & 35416.]

NOTICE OF APPEAL

To the United States Court of Appeals for the Ninth Circuit:

Notice Is Hereby Given that Richard D. Leuschner, plaintiff, cross-defendant and third party defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that portion of the judgment made and entered on March 28, 1957, in the above entitled matter as follows:

“It Is Hereby Ordered, Adjudged and Decreed that Richard D. Leuschner, plaintiff in Civil Action No. 35416, take nothing in said action and the same is hereby dismissed on the merits”;

Dated this 25th day of April, 1957.

/s/ C. A. CANELLO,

/s/ C. RAY ROBINSON,

Attorneys for Richard D. Leuschner.

[Endorsed]: Filed April 26, 1957.

[Title of District Court and Cause No. 35416.]

EXCERPT FROM DOCKET ENTRIES

1956

Apr. 24—Filed petition for removal with X-complaint and summons.

30—Filed notice & motion of Erida Leuschner Reichert to bring in 3rd party deft. May 7, 1957.

* * * * *

May 8—Filed 3rd party complaint and issued summons.

9—Filed order granting motion to bring in 3rd party deft. (Hamlin)

* * * * *

Aug. 22—Filed answer of United States to 3rd party complaint.

22—Filed answer of United States to x-complaint.

1957

Mar. 1—Ordered, case cont'd. to March 7, 1957 for trial. (Harris)

7—Ord. case assigned to Judge Ritter for trial this date. (Goodman)

7—Court trial. Evidence and exhibits introduced, motion of USA to enforce lien denied and further trial cont'd. to March 7, 1957 at 10 AM. (Ritter)

8—Further court trial. Ruled that Richard D. Leuschner has failed in action against First Western Bank and in x-complaint vs. Trustees. Bank not liable to USA un-

1957

Mar. 8 der penalty provision and bank allowed
(Cont.) atty. fees as prayed. USA no right to
foreclose lien. Counsel to prepare find-
ings, conclusions & judgment. (Ritter)

Mar. 13—Lodged findings of fact and conclusions
of law.

13—Lodged judgment.

* * * * *

28—Filed findings & conclusions (In 35398).
(Ritter)

28—Entered judgment — filed March 28, 1957
—that plaintiff Richard D. Leuschner in
35416 take nothing and said action is
dism., United States, Plaintiff in 35398
take nothing and action dismiss. First West-
ern Bank & Trust Co. defendant. x-complainant
in 35416 and defendant. 3rd party plaintiff. in
35398 have judgment of \$3500 atty. fees
from funds on deposit in Savings Acct.
No. 803406 at SF main office of 1st West-
ern Bank and Trust Co. and Erida
Leuschner Reichert defendant. x-defendant. & 3rd
party plaintiff. in 35416 and 3rd party defendant.
in 35398 recover \$500.00 atty. fee from
funds on account 803406 at SF main of-
fice of 1st Western Bank & Trust Co. (In
35398). (Ritter)

Mar. 28—Mailed notices.

Apr. 26—Filed notice of appeal by Richard D.
Leuschner (In 35398-Civ.).

29—Mailed notices.

1957

- Apr. 26—Filed substitution of C. Ray Robinson as counsel for Richard D. Leuschner (In 35398).
- 29—Filed appeal bond in sum of \$250.00 (In 35398).
- May 27—Filed notice of appeal by USA (In 35398).
- 28—Mailed notices.
- 28—Filed designation of Leuschner of record on appeal (In 35398).
- 28—Filed statement of points upon which Leuschner intends to rely on appeal (In 35398).
- 28—Filed notice of association of Lewis, Field DeGoff & Stein and M. S. Huberman as counsel for appellant, Leuschner (In 35398).
- 31—Filed ord. ext. time to docket record on appeal to July 8, 1957 (In 35398). (Murphy).
- June 7—Filed reporter's transcript of trial proceedings (In 35398).

[Title of District Court and Causes Nos. 35398-35416.]

DESIGNATION OF MATTERS FOR INCLUSION IN RECORD ON APPEAL

Pursuant to Rule 75 of the Federal Rules of Civil Procedure, and in regard to appeals, appellant Richard D. Leuschner hereby designates for inclusion in the record on appeal to the United

States Court of Appeals for the Ninth Circuit, taken by notice of appeal filed April 26, 1957, the following portions of the record and proceedings and evidence in action No. 35398 in the above entitled Court:

1. The complaint;
2. The third party complaint;
3. The answer of the defendant First Western Bank and Trust Company;
4. Answer of third party defendant Erida Leuschner Reichert to third party complaint;
5. Answer of third party defendant Erida Leuschner Reichert to original complaint;
6. Motion of Richard D. Leuschner to intervene as a defendant;
7. Order permitting intervention of Richard D. Leuschner;
8. Answer of Richard D. Leuschner, intervenor;
9. Answer of third party Richard D. Leuschner;
10. Motion of Richard D. Leuschner to amend answer;
11. Order permitting amendment to answer of Richard D. Leuschner;
12. Amendment to answer of third party Richard D. Leuschner;
13. Order for joint pretrial hearing and joint trial;
14. Stipulation of facts;
15. Objections by United States of America to proposed findings of fact and request for additional findings of fact;
16. Notice of appeal;

17. This designation;
18. Journal entries;
19. The deposition of William O. Hogan;
20. The reporter's transcript in its entirety, including all exhibits introduced in evidence and/or marked for identification.

And appellant Richard D. Leuschner hereby further designates the following portions of the record, proceedings and evidence in action No. 35416, in the above entitled Court (in so far as said designation is not duplicated by the designation applicable to the record, proceedings and evidence in action No. 35398):

1. Cross-complaint in action No. 456519, in the Superior Court of the State of California, in and for the City and County of San Francisco;

2. Petition of the United States of America for removal;

3. Motion of Erida Leuschner Reichert to bring in United States of America as third party defendant;

4. Order granting motion to bring in third party defendant;

5. Answer of cross-defendant Richard D. Leuschner to cross complaint;

6. Third party complaint;

7. Answer of United States of America to third party complaint;

8. Answer of United States of America to cross-complaint;

9. Findings of fact and conclusions of law;

10. Judgment.

Dated: May 27th, 1957.

A. B. CANELO,
C. RAY ROBINSON,
M. S. HUBERMAN,
LEWIS, FIELD, DeGOFF and
STEIN,

/s/ By SIDNEY DeGOFF,
Attorneys for Appellant, Richard
D. Leuschner.

[Endorsed]: Filed May 28, 1957.

[Title of District Court and Causes Nos. 35398-
35416.]

CERTIFICATE OF CLERK TO CONSOLI-
DATED RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above entitled cases and constitute the record on appeal herein as designated by the attorneys for the appellant:

In 35398-Civil:

Excerpt from Docket Entries.

Complaint.

Order Granting Motion to Bring in Necessary Parties and Third Party Defendants.

Third Party Complaint.

Answer of First Western Bank and Trust Company.

Answer of Third-Party Deft. Erida Leuschner Reichert to Third Party Complaint.

Answer of Third-Party Deft. Erida Leuschner Reichert to Original Complaint.

Motion of Richard D. Leuschner to intervene as Defendant.

Order Permitting Richard D. Leuschner to intervene.

Answer of Richard D. Leuschner, Intervener.

Answer of Richard D. Leuschner, Third Party Deft.

Motion of Richard D. Leuschner to Amend Answer.

Order Permitting Richard D. Leuschner to Amend Answer.

Amendment to Answer of Richard D. Leuschner, Third Party Deft.

Stipulation of Facts.

Deposition of William O. Hogan.

In 35416-Civil:

Excerpt from Docket Entries.

Petition for Removal by United States with copy of Cross-Complaint.

Motion of Erida Leuschner Reichert to Bring in Third-Party Defendant.

Answer of x-deft. Richard D. Leuschner to Cross-Complaint.

Third Party Complaint.

Order Granting Motion to Bring in Third Party Deft.

Order Denying Motion of United States to Dismiss.

Answer of United States to Third Party Complaint.

Answer of United States of America to Cross-Complaint.

In 35398 and 35416-Consolidated:

Order for Joint Pre-Trial and Trial.

Objections by United States of America to Proposed Findings and Request for Additional Findings of Fact.

Findings of Fact and Conclusions of Law.

Judgment.

Substitution of Attorneys.

Notice of Appeal by Richard D. Leuschner.

Cost Bond on Appeal.

Notice of Appeal by United States of America.

Designation of Record on Appeal by Richard D. Leuschner.

Statement of Points Upon Which Richard D. Leuschner Intends to Rely on Appeal.

Notice of Association of Attorneys.

Order Extending Time to Docket Record on Appeal.

Reporter's Transcript of Trial Proceedings March 7, 8 and 28, 1957.

Defendants' Exhibits A, C and D. (Note: Exhibit B is not included for the reason it does not appear in the files in this office.)

In Witness Whereof I have hereunto set my

hand and affixed the seal of said District Court this 8th day of July, 1957.

[Seal] C. W. CALBREATH,
Clerk,
/s/ By MARGARET P. BLAIR,
Deputy Clerk.

[Title of District Court and Cause No. 35398.]

DEPOSITION OF WILLIAM O. HOGAN

Be It Remembered, that pursuant to oral stipulation, and on Friday, October 19, 1956, commencing at the hour of 2:00 p.m. thereof, at the offices of the United States Attorney, 445 Post Office Building, Seventh and Mission Streets, San Francisco, California, before me, Helen M. Sayer, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared

WILLIAM O. HOGAN

called as a witness by the plaintiff, who, being by me first [1]* duly sworn, was thereupon examined and interrogated as hereinafter set forth.

Hon. Lloyd H. Burke, United States Attorney, by Leon Yudkin, Esq., Special Assistant to the Regional Counsel, Internal Revenue Service, appeared as Attorney for the United States of America, Plaintiff.

Christopher M. Jenks, Esq., appeared as attorney

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Deposition of William O. Hogan.)

for First Western Bank & Trust Co., Defendant and Third Party Plaintiff.

M. Mitchell Bourquin, Esq., by George DeLew, Esq., appeared as attorney for Richard Leuschner, Third Party Defendant.

Messrs. Slack & Zook, by John S. Troxel, Esq., appeared as attorneys for Erida L. Reichert, Third Party Defendant.

(It was stipulated by counsel for the respective parties that the Notary Public, after swearing the witness, might be excused from further attendance.)

Mr. Yudkin: Does anyone wish to make any statement before we get on with the deposition?

Mr. Jenks: I forget whether in the Federal Court a deposition has put in the usual stipulations that you do in the State Court, but I think it is in the Federal Rules that all objections except as to the form of the question are reserved. [2]

Mr. Yudkin: That is in the rules.

Mr. Jenkins: Do you want to add the stipulation that the deposition may be used even if not signed, provided Mr. Hogan has had an opportunity to sign it?

Mr. Troxel: Reasonable opportunity prior to the time of trial.

Mr. Jenks: That is right.

Mr. Yudkin: That is all right.

Mr. Jenks: Then I think I want to put in one other stipulation in accordance with our conversation: While this is being taken only in the case

(Deposition of William O. Hogan.)

instituted by the United States, is it stipulated that it may be used in the other case originally instituted by Mr. Leuschner in the State Court and later removed to the Federal Court?

Mr. Troxel: Now being Federal Number 35416.

Mr. Yudkin: That is all right.

Mr. DeLew: So stipulated.

Examination by Mr. Yudkin

Q. (By Mr. Yudkin): Do you want to give us your full name?

A. My name is William O. Hogan.

Q. Your present position?

A. Assistant Trust Officer at First Western Bank & Trust Company.

Q. How long have you held that position?

A. For nine years.

Mr. Jenks: I might make a statement for the record there, [3] Mr. Yudkin, so that it will be clear. The First Western Bank & Trust Company is the same corporation previously known as The San Francisco Bank. The San Francisco Bank, as I think we all know, operated in San Francisco under that name for many years. On November 9, 1954 it changed its name to First Western Bank & Trust Company, so when Mr. Hogan stated he had held that position nine years, it is true he has worked in that corporation but under two separate corporate names.

Q. (By Mr. Yudkin): Mr. Hogan, are you familiar with all the facts relating to the trust and

(Deposition of William O. Hogan.)

the operation thereof in so far as it concerns your bank?

Mr. Troxel: Would you like to specify which trust that is, for the reason, counsel, that there are quite a number of trusts in which my particular client and the bank are interested, some of which pertain not at all to the other party.

Mr. Jenks: I may say this, Mr. Yudkin, to help Mr. Troxel out and to help you out: There is more than one Leuschner trust. The trust which we are talking about is described as—how do you describe it, Mr. Hogan?

A. We generally identify it in our place as P-109.

Mr. Jenks: This trust was established by whom?

A. All of these trusts were established by the same Trustor.

Mr. Jenks: So you identify it as P-109?

A. Yes.

Q. (By Mr. Yudkin): Tell me, is that the one established on [4] April 16, 1941 by Ida Denicke Leuschner, or are there others in addition?

A. There are others that I believe may have been established on the same day, but this is the trust that is usually identified as the trust which has three beneficiaries, Erida L. Reichert, Richard Leuschner, Sr., and Lynne Leuschner.

Mr. Jenks: I believe just to clarify it, if I may, again, that Lynne Leuschner is the niece of Richard Leuschner, Sr. and Erida Leuschner Reichert.

A. That is right.

(Deposition of William O. Hogan.)

Q. (By Mr. Yudkin): Are there any other trusts administered by the bank in which Richard Leuschner, Sr. has any interest?

A. There is an unfunded insurance trust.

Q. What is it? Could you describe that, please?

A. It is a trust which was established many years ago wherein Leuschner deposited certain life insurance policies with us subject to an agreement which was written out. It is an unfunded trust, and whether the policies are still in force is something that we don't know. He pays the premiums.

Q. What is the role of the bank in that?

A. As Trustee, but the trust as it exists at the present time does not impose any trustee duties upon the bank other than to safekeep the insurance policies. We have no duty to see that the policies are paid up, and duties as a Trustee would only commence in the event of his death. [5]

Q. Who are the beneficiaries of the policies?

A. I would have to just go on knowledge and belief there; I believe that they are his two children and possibly whoever his wife is at the time of his death.

Q. Do you know, off hand, whether those are revocable or irrevocable policies; that is, whether he has the right to change the beneficiaries?

A. I believe he does.

Q. (By Mr. DeLew): Does not?

A. Does. But the facts might prove that I am mistaken.

(Deposition of William O. Hogan.)

Q. (By Mr. Yudkin): Do you know with which companies those policies are taken out?

A. No, I don't.

Q. You prepared the affidavit of March 29, 1956 in the matter of Leuschner vs. First Western Bank?

Mr. Jenks: I prepared it, Mr. Yudkin. Mr. Hogan signed it; I prepared it.

Q. (By Mr. Yudkin): Were those statements correct? A. Yes, they were.

Q. Are you familiar with another affidavit filed in this case by D. L. Anderson, Vice President and Senior Trust Officer of the bank?

Mr. Jenks: I also prepared that, Mr. Yudkin.

Q. (By Mr. Yudkin): I was asking, are you familiar with it?

A. I would have to see it to refresh my memory.
(Document shown to the witness.) [6]

A. I don't know, Mr. Yudkin.

Q. Do you want to read it? For the record, I just want to identify it as the affidavit executed on May 4, 1956.

Mr. Jenks: What do you want to use it for, Mr. Yudkin? I will stipulate that Mr. Anderson signed it and he is the Vice President and Senior Trust Officer. I believe Mr. Anderson signed it because Mr. Hogan was out of the bank at that time, either on vacation or home with a cold.

The Witness: When was this?

Mr. Jenks: May.

The Witness: On May 4th?

(Deposition of William O. Hogan.)

Mr. Jenks: Yes.

The Witness: Yes; I was out of town.

Mr. DeLew: In what action was that?

Mr. Yudkin: That was filed in this action.

Mr. DeLew: 35398.

Q. (By Mr. Yudkin): Would you read it, please? There appears to be an apparent discrepancy between the facts stated in that affidavit and the affidavit signed by yourself.

Mr. Jenks: I will state, Mr. Yudkin, that I do not believe there was any discrepancy between the affidavits. One affidavit signed by Mr. Hogan states that the bank has this money as Trustee; the other affidavits, more complete, points out that there are three trustees, which, as we all know, is the complete, accurate picture, but there are three Trustees. [7]

There is also, I believe, a difference in amount, if they state amounts, because of the different dates.

Mr. Yudkin: There is also a difference in that in Mr. Hogan's affidavit he states there was an amount due at the time of the levy, whereas in this affidavit of Anderson it is stated that there were no amounts due Leuschner at the time of the levy.

Mr. Jenks: It is a question of accounting procedure, Mr. Yudkin. Something comes in during the month. The levy was made July 27th, and under the Trust Department procedure payments are made to all income beneficiaries on the 30th of each month, so under the Trust Department ac-

(Deposition of William O. Hogan.)

counting procedure on the 27th there was no amount which on the 27th had been allocated to Mr. Leuschner. On the 27th there was income which had been received since the first of July but had not been allocated between the income beneficiaries.

Q. (By Mr. Yudkin): For the record, Mr. Hogan, will you explain to us just what the properties are that are in the trust. If there are too many, just name them by general category.

A. The properties consist of common stocks, preferred stocks, cash and real estate.

Q. In whose names are the stocks?

A. The stocks are liable to be—the certificates are liable to be registered three different ways. If we have had the certificate for an extended period of time during which [8] Armin Leuschner was alive, then the certificate would be registered in the name of the San Francisco Bank, Armin O. Leuschner, Richard D. Leuschner and Erida L. Reichert as Trustees of the trust created by Ida Denicke Leuschner on whatever date it is, April 21, 1941 I think is the date.

Mr. Jenks: That is one. Suppose you let him finish?

Mr. Yudkin: Yes.

A. Another set might—and I don't think that there are any certificates registered in this particular way—San Francisco Bank, Richard D. Leuschner, Erida L. Reichert as Trustees of the trust

(Deposition of William O. Hogan.)

created by Ida Denicke Leuschner, dated whatever the date of the agreement is.

Since 1955 the assets which have been acquired by the trust would be registered in the name of our nominee, which is the Montgomery Company.

Q. That is for trading purposes? A. Yes.

Q. Who holds the cash?

A. The cash is on deposit at the bank.

Q. At the First Western Bank? A. Yes.

Q. And that has been that way during the life of the trust? A. Yes.

Q. And when it was the San Francisco Bank?

A. Yes.

Mr. Jenks: Mr. Yudkin, in case you want to go into it—if not I will do it on cross examination—when he says the cash is on deposit with the bank, it is on deposit with the bank [9] in its corporate capacity. The Trust Department does not carry deposits—is not permitted to by law.

Q. (By Mr. Yudkin): Who receives the dividends on the stock? That is, are they sent to the bank? A. They are sent to the bank.

Q. And you actually receive the checks and process them and credit the account of the trust; is that correct? A. Yes.

Mr. Troxel: I think that calls for the conclusion of the witness as to who receives them. The bank receives them.

Mr. Yudkin: I mean physically.

Mr. Jenks: Physically the trust department receives them.

(Deposition of William O. Hogan.)

Q. (By Mr. Yudkin): In whose name is the real property? You said the Trust had some real property?

A. I believe it is in the name of the original Trustees.

Q. That is the first set of names you mentioned?

A. Yes; that includes Armin O. Leuschner.

Q. Does the real property produce income?

A. It produces gross income, but I believe that, as a general rule, it operates at a net loss.

Q. In other words, you actually receive nothing net from the real property; is that right?

A. Well, this property is all down in Merced, and it is a fig ranch. Though we receive—have on occasion been able to [10] harvest the crop and receive proceeds from the harvest of the crop, pre-harvesting costs and the taxes and the depreciation on the fig trees has resulted in a net operating loss of the ranch.

Q. Who receives the gross and pays out the costs?

Mr. Jenks: Again I think that calls for a conclusion.

Mr. Yudkin: Physically.

Mr. Jenks: I will stipulate with you, Mr. Yudkin, that all of the receipts come to the Trust Department. Now who receives it is a different question, because the stock certificates which are in the name of the four trustees, the dividend check is payable to the four of them.

Mr. Yudkin: Physically—

(Deposition of William O. Hogan.)

Mr. Jenks: If the stock certificates are in the name of the Montgomery Company, possibly the Montgomery Company receives it, but physically the income comes into the Trust Department of the bank. I will stipulate to that.

Mr. Troxel: I have no objection to that stipulation.

Mr. DeLew: None at all.

Q. (By Mr. Yudkin): Are there any agreements concerning this trust among the beneficiaries or the Trustees other than the trust agreement itself?

Mr. Jenks: If he knows. I wouldn't expect him to know what particular agreements the beneficiaries might have among themselves. [11]

Mr. Yudkin: I am just asking him if he knows of any.

A. I do not know of any agreements pertaining to this trust between any of the parties.

Q. In your affidavit you stated that Richard Leuschner became entitled to some moneys. Can you tell us just how you reached that conclusion?

Mr. Jenks: I told you I prepared it. I probably reached that conclusion.

Q. (By Mr. Yudkin): If you signed it, it must have been agreed to by you. How did you reach that conclusion?

A. Well, the Trust Agreement provides that the beneficiaries are each entitled to a certain proportion of the net income, so one would say ordinarily that as the income is received by the trustees the

(Deposition of William O. Hogan.)

beneficiaries are entitled to the accrued income to that point, minus any disbursements.

Mr. Jenks: May I suggest something? This is a wasting trust, is it not?

A. Theoretically it is a wasting trust.

Q. So that in addition to the net income the beneficiaries are also entitled each month to a portion of the principal? A. Yes.

Q. (By Mr. Yudkin): Would you say that is more or less automatic, depending upon the amount of the income and the value of the trust; that is, it is a matter of mathematics, is that correct, the amount that each beneficiary would be [12] entitled to each month out of the trust?

Mr. DeLew: Just a minute. I think I will object to that on the ground that the Trust Agreement itself speaks for itself as to the respective rights and interest in the trust. I don't think it is up to Mr. Hogan or to any of us to answer questions concerning that. You have got the trust instrument that determines all those things.

Mr. Yudkin: I was going into the operation of the trust. This trust instrument is dated in 1941.

Mr. Jenks: Mr. DeLew objects that that calls for a legal opinion on the part of the witness.

Mr. Yudkin: I wasn't asking for a legal conclusion; I was only asking as to how they operated.

Mr. DeLew: If you phrase it along those lines, I might withdraw the objection, or not have any; but if we are trying to construe the trust agreement, let's not do it.

(Deposition of William O. Hogan.)

Mr. Yudkin: No, I am not trying to construe it; I am just trying to get how this thing was being handled.

Q. When you say that a beneficiary was entitled to some money, isn't it true that your determination as to how much he would receive would follow from determining the rights he had under the trust and applying those rights to the amount of money available? Is that correct? A. Yes.

Q. Who did that,—the actual computations and so forth?

A. Well, the trust agreement provides that the beneficiaries shall receive a certain proportion of the net income, so in a particular month on the 30th of the month we are aware of what has actually been received by the bank for the account of that trust. So then we allocate it as follows: 40 per cent to Leuschner, 40 per cent to Mrs. Reichert, and 20 per cent to Lynne Leuschner.

Q. And that is done every month; is that correct?

A. Yes. At the same time, however, we reduce that amount by the amount of our fee which we take monthly.

Q. That is done automatically from month to month within the trust department of the bank; is that correct?

A. I would say it is an automatic computation.

Q. You haven't had any occasion in those computations and the payments resulting from those computations to consult with your co-trustees?

(Deposition of William O. Hogan.)

A. I have not, no.

Q. To your knowledge the bank has not?

A. I believe that the bank has, because in the inception of any trust there is a great deal of consultation as to when and how certain acts ought to be performed.

Q. But whatever those may have been at the inception of the trust, you are not aware of any consultations during the time that you have been in charge of this trust; is that correct? A. No.

Mr. Jenks: On what matters, Mr. Yudkin?

Mr. Yudkin: On this matter of payment and allocation that he just testified to. [14]

Mr. Jenks: I know there have been recent consultations of the three co-trustees on other matters.

Mr. Yudkin: No, I am just directing it to what he had testified to, the allocations.

Mr. Jenks: Once the co-trustees agreed as to the mathematics of how to compute the income they do not have to continue to agree each month, although I believe there are some trusts where the co-trustees do insist on signing the checks; isn't that right.

A. That is right.

Mr. Jenks: But not in most of them.

Mr. Yudkin: A levy was served upon you on July 22, 1955?

Mr. Jenks: The 27th.

Mr. Yudkin: The 22nd.

Mr. Jenks: The 27th, but I don't think it makes much difference.

(Deposition of William O. Hogan.)

The Witness: You mean that was served on the bank, don't you?

Mr. Yudkin: The bank or the trust department.

A. The actual levy—I presume that is what you are talking about—was served upon D. J. Flynn.

Mr. Jenks: It does say the 22nd.

Q. (By Mr. Yudkin): Who is Mr. Flynn?

A. Mr. Flynn is an Assistant Trust Officer.

Mr. Jenks: That is the levy, I think, Mr. Yudkin, if [15] we may identify it, on form 665-A addressed to Trust Officer, First Western (formerly San Francisco Bank), San Francisco, California; is that correct? That is what you are referring to?

Mr. Yudkin: That is correct.

Q. At the time that levy was served upon the bank Mr. Leuschner had the rights under this trust that you just spoke about and which was being administered by the bank as you stated—

Mr. Jenks: I object to the statement “administered by the bank”; administered by the three co-trustees.

Mr. Yudkin: Administered by the bank and the other trustees in the manner you stated; is that correct?

Mr. DeLew: Will you let me have that question read?

(Question read by reporter.)

Mr. DeLew: The question is, as I understand it, at this time, the time of the levy, all three trustees have these funds; is that your question?

(Deposition of William O. Hogan.)

Mr. Yudkin: I am directing it to his testimony as to how this thing was operating.

Mr. Jenks: As I understand the question, it is, did Mr. Leuschner at that time have rights under the trust.

Mr. DeLew: If that is the question, I have no objection.

Q. (By Mr. Yudkin): Is that correct?

A. Yes. [16]

Q. Are there occasions when the money is not paid directly to the beneficiaries, that is, on some months, and held by the bank?

A. No, to my knowledge there has never been a time when we have not paid the net income directly to the beneficiaries, except in this particular instance.

Q. At the time of the levy, then, the problem before the bank was simply whether or not to pay the United States or pay Mr. Leuschner, was that correct?

Mr. Jenks: I object to that as calling for a conclusion.

Mr. DeLew: I also object.

Mr. Troxel: For this reason, counsel: For the record, are you very willing to stipulate that there was never a service of the levy on any of the other co-trustees?

Mr. Yudkin: Well, to my knowledge I don't know that there was any service on them, so I will be prepared to stipulate, in case some collection

(Deposition of William O. Hogan.)

officer comes up with a long lost copy of the notice of levy.

Mr. Troxel: If he does, it will be most peculiar. They haven't seen it. If you wanted to ask this question: At the time of the levy, the problem was what to do? To that I will agree.

Mr. Yudkin: I will withdraw that other question.

Q. But for the levy upon the bank, this bank would have paid whatever income became due each month to Mr. Leuschner; is that correct? [17]

Mr. DeLew: Just a minute now. The witness has already testified that these funds were paid out of the trust on the 30th day of the month. This levy was made on the 22nd.

Mr. Yudkin: I am saying but for the levy of the 22nd.

Mr. DeLew: No money would have been paid on the 22nd.

Mr. Yudkin: No, but for that levy on the 22nd, the money would have been paid to Mr. Leuschner; isn't that correct?

Mr. Jenks: If you ask the question this way, I will have no objection; if the levy had not been served on the 22nd the three co-trustees, acting through the trust department of the First Western Bank & Trust would have paid Mr. Leuschner his share of the income and principal on July 30th.

Mr. Troxel: I don't think that is quite accurate either, counsel. I think that the three co-trustees would have paid the amount due Mr. Leuschner

(Deposition of William O. Hogan.)

as calculated by the Trust Department of the First Western Bank & Trust Company.

Q. (By Mr. Yudkin): Can I ask the question this way, now that we have gotten through with counsel testifying—I would like to put the question to him this way: But for the service of this levy on the 22nd, the bank, in the manner in which it was operating this trust in conjunction with the other trustees, would have made the payment to Mr. Leuschner on the 30th; is that correct?

A. That is right.

Q. And would have made the payments every month thereafter? [18]

A. Yes.

Mr. Jenks: As long as Mr. Leuschner is alive, and I think he is still alive.

Mr. Yudkin: Well, we assume that.

Q. I assume you do not have this available, but can you give me an approximation of the amount of money that was paid to Mr. Leuschner under this trust from January 7, 1952 until the date of the levy?

A. Well, the approximation would be pretty rough, but I would say that it would amount to about—I'm sorry I can't, because there were certain,——

Mr. Jenks: Can we do this: I will tell you what he does have, Mr. Yudkin; he can tell you how much money is now held that otherwise would have been paid to Mr. Leuschner since July 22nd. That figure we do have.

(Deposition of William O. Hogan.)

Mr. Yudkin: Can we agree on this: That you will supply the information.

Mr. DeLew: What is the materiality of it?

Mr. Jenks: The income is not the same each month.

Mr. Yudkin: I realize that.

The Witness: And it isn't the same each year, because many of these companies are growth companies which have increased their dividends during that period of which you speak.

(Discussion off the record.)

Mr. Yudkin: It is stipulated that that information will be furnished? [19]

Mr. Jenks: Subject to objections as to relevancy, materiality, etc.

Q. (By Mr. Yudkin): How much is now payable to Mr. Leuschner under the trust?

Mr. Jenks: By "now" will you accept September 30th?

Mr. Yudkin: All right.

A. Twelve thousand——

Mr. DeLew: Wait just a minute. You say "How much is now payable under the trust"?

Mr. Yudkin: How much is payable to Mr. Leuschner?

Mr. DeLew: Nothing is payable to him.

Mr. Yudkin: But for the levy.

Mr. DeLew: I am going to object to it unless your question is had the levy not been made how much would have been paid by all three trustees.

Mr. Jenks: I don't think we can get that figure

(Deposition of William O. Hogan.)

off-hand, Mr. DeLew; we can give the figure as to how much has been accumulated, which includes some savings account interest—not a great deal, but it does include \$65.60 savings account interest, because this money was placed in an interest-bearing account. We felt that whoever gets it should be entitled to interest on it instead of having it sitting in a commercial account not drawing interest. Frame it as you want it, but we do have the figure for September 30th as to the amount now held [20] by the trustees.

Mr. Yudkin: Can you give us that figure?

Mr. Troxel: Can we have the witness testify to the figure, please?

Mr. Yudkin: Right.

Mr. Troxel: So that if there is an answer given it will be one that is given by the witness.

Mr. Jenks: All right.

A. I believe it is \$12,026 and some odd cents.

Q. (By Mr. Yudkin): This is the figure held for Mr. Richard Leuschner but for our levy; is that correct?

Mr. Jenks: I think that calls for the conclusion of the witness.

Mr. Yudkin: Can you answer the question, please?

Mr. DeLew: Wait just a minute.

Mr. Jenks: I think it calls for a conclusion, and I object to the form of the question. We all know why it is being held, Mr. Yudkin; I don't think we have to put a legal——

(Deposition of William O. Hogan.)

Mr. Yudkin: Will you all stipulate that but for this levy the figure given would be paid to Mr. Leuschner? Will you stipulate to that?

Mr. Jenks: If you give us a release today, as far as I am concerned that figure would be paid to Mr. Leuschner; whether the co-trustees would agree or not I don't know; I can only assume they would. [21]

Mr. Yudkin: What would you say to that, Mr. Troxel?

Mr. Troxel: I would stipulate that the figure the witness testified to less the amount that is approved by reason of certain moneys being deposited in a savings account, is the total of the moneys that the bank acting as the computing and disbursing agent for the three trustees would have paid to Mr. Leuschner under the terms of the trust since the date of the levy to and including September 30th.

Mr. Yudkin: Will you stipulate to that, Mr. DeLew?

Mr. DeLew: The only thing I will stipulate to is that the three trustees have this sum of money on hand.

Mr. Yudkin: Payable to Mr. Leuschner?

Mr. DeLew: Not payable, no.

Mr. Yudkin: Whose is it?

Mr. Troxel: We don't know.

Mr. DeLew: That could have been paid to Mr. Leuschner. I say it is in the hands of the three trustees.

(Deposition of William O. Hogan.)

Mr. Jenks: I might put it in the record, Mr. Yudkin, that of course the Trust Department would expect to be reimbursed for its additional costs and attorney's fees in this litigation.

Mr. Troxel: That is correct as far as the attorneys for as Mrs. Erida Leuschner Reichert are concerned also.

Mr. DeLew: I might say we would be glad to get it.

Mr. Yudkin: I have no further questions. [22]

Mr. Jenks: Do you gentlemen have any questions? I think I should be the last one, being the attorney for the witness.

Mr. DeLew: Yes.

(Discussion off the record.)

Examination by Mr. DeLew

Q. (By Mr. DeLew): A while back, Mr. Hogan, when you were explaining in some degree the mechanics of the bank's operations, you mentioned there that as the income came to the hands of the Trust Department of the bank for the account of the three trustees, that it was deposited—and if I misstate you, correct me—that it was deposited to the credit of the Trustees with the bank; is that right? A. Yes.

Q. And the funds were held for the three trustees by the bank operating as a bank?

A. Yes.

Q. Following that you went on to say and explain some things concerning allocations, which I

(Deposition of William O. Hogan.)

am sorry missed me, went over my head; but is it not true that the manner in which any allocation of money was made by the Trust Department acting as Trustee and for the other Trustees, that the allocation was made at the time the checks went forward to the individual beneficiaries of the trust, and not before; is that not correct?

A. Allocation was made on the 30th of each month.

Q. And no allocation whatsoever was made with that income prior to that time? [23]

A. No, there was no occasion for us to compute that, nor do we keep it under a separate heading for each beneficiary.

Q. Prior to that time it merely remained on deposit to the credit of the trust itself?

A. That is right.

Mr. DeLew: That is all the questions I have.

Examination by Mr. Troxel

Q. (By Mr. Troxel): Mr. Hogan, you mentioned Armin O. Leuschner as a Trustee of this particular trust. Will you give me the reason that he is not acting as a Trustee now?

A. He died in, I believe it was May, of 1953.

Q. Then the three Trustees—the First Western Bank, Richard Denicke Leuschner, Sr., and Erida Leuschner Reichert,—are the successor Trustees or surviving Trustees of the trust? A. Yes.

Q. I believe you stated that these moneys—either you or your counsel testified; I don't know

(Deposition of William O. Hogan.)

which—that the moneys had been placed in a savings account which earned interest. Can you give me the title of the savings account in which these moneys that have been the subject of our discussion this afternoon were placed?

A. Without consulting the card I cannot, but I believe that they are in the name of the three Trustees.

Q. And was consultation had among the co-trustees of this trust prior to depositing these funds in the savings account?

Mr. Yudkin: I would object to that. Would he know? [24]

Mr. Jenks: If he knows.

Mr. Yudkin: That was not qualified.

Mr. Troxel: Among the three trustees is his own bank, and I believe he testified he has been handling the trust. If you know.

A. I believe not.

Mr. Troxel: I have no other questions at this time.

Mr. Jenks: Well all counsel stipulate that during the pendency of this litigation—and I can't recall whether it is three months ago or five months ago—I informed all counsel that the money was in a savings account, and that includes counsel for Mr. Leuschner, who is a beneficiary and trustee, counsel for Mrs. Reichert who is a trustee, and counsel for the Government.

(Discussion off the record.)

Mr. DeLew: That you told us what?

(Deposition of William O. Hogan.)

Mr. Jenks: In other words, the other trustees had notice that the funds were in the savings account.

The Witness: This is the \$12,000.

Mr. Jenks: As it has grown to \$12,000.

The Witness: \$12,000 payable to Leuschner.

Mr. DeLew: There is nothing said about being payable to Leuschner.

Mr. Jenks: The \$12,000 we have been talking about.

Mr. Troxel: Before I will stipulate to that, counsel, I will have to ask your client one question that I have avoided asking him. [25]

Mr. Jenks: All right.

Q. (By Mr. Troxel): Are the authorized signatures of all three trustees on the savings account signature card, if you know?

Q. The answer is "No, I don't know," or the answer is "No, the signatures are not there"?

A. The answer is no, the signatures are not there.

Mr. Troxel: I will stipulate that you told me that the bank intended to place it in a savings account.

Mr. Yudkin: Will you identify the money?

Mr. Troxel: This money that has been under discussion for 50 minutes.

Mr. Yudkin: Which everyone is trying to be very coy about identifying.

Mr. DeLew: It is identified as money in the savings account in the name of the trust.

(Deposition of William O. Hogan.)

Mr. Jenks: I will stipulate to one other thing, gentlemen. Mr. Hogan does not remember. Let's not have any quibbles here on the facts. The name of that account is "First Western Bank & Trust Company, T/U Leuschner Agreement, dated April 16, 1941, Richard Leuschner, Sr., Trust No. P-109-1-A." It is savings account No. 803406, and the heading of the card has the word "Remarks," and under there, if you gentlemen ever want to see the card, you will find the following: "For payable interest held a/c U. S. Treasury notice of levy."

It was opened on January 10, 1956.

Mr. Troxel: In other words the account is not in the name of the three trustees.

Mr. Jenks: I say that is the way the card reads.

Mr. Yudkin: I will stipulate that.

The Witness: I would like to say something else. That is the way the card reads, which is in the possession of the Trust Department. What the card says, in possession of the savings department is something I can only presume.

Q. (By Mr. Jenks): That is our card in the Trust Department? A. Yes.

Mr. DeLew: That doesn't mean anything; it is only your opinion.

The Witness: As to the savings department, in my opinion it is in the name of all the Trustees.

Mr. Troxel: This card reflects only the opinion of the trust department as to the title.

Mr. Jenks: It doesn't even reflect that; it is only a memorandum account.

(Deposition of William O. Hogan.)

Mr. Yudkin: I think we ought to go off the record.

(Discussion off the record.)

Q. (By Mr. DeLew): In other words, Mr. Hogan, the card referred to by Mr. Jenks a moment ago is not the account maintained by the First Western Bank operating as a bank and does not disclose the savings account to which reference has been made—does not disclose the names on that account to your knowledge? [27]

A. I don't know; it is simply a reference card.

Mr. Jenks: Any more questions, Mr. Troxel?

Mr. Troxel: I have no questions.

Mr. DeLew: I have none.

Examination by Mr. Jenks

Q. (By Mr. Jenks): Mr. Hogan, when you were asked about the mechanical operation of the bank, I believe you testified that when the income came in the trust department deposited that income with the bank in a commercial account in the name of the three trustees. Is that the procedure today? Is there a commercial account in the bank in the name of these three trustees, or in the name of any trustees?

A. Are we talking about the money as it comes in?

Q. A dividend, for example, that is made out to all the trustees, that money comes in; what does the Trust Department do with it today?

A. It credits those funds to the particular trust in question.

(Deposition of William O. Hogan.)

Q. That is in the Trust Department?

A. Yes.

Q. What do they do with the money? Does the Trust Department hold it on deposit?

A. The Trust Department has one large commercial account in which they deposit all funds which are allocated as income for all trusts in one commercial account.

Q. And how long has that procedure been in effect? [28]

A. I believe that procedure has been in effect since the first of 1955.

Mr. DeLew: May I just ask a question here?

Mr. Jenks: Yes.

Q. (By Mr. DeLew): That account that is maintained with the bank, do I understand you to mean that that account is just one large account for all the trusts maintained by the bank?

A. Yes.

Q. In other words, if you have a thousand trusts in San Francisco——

A. If we have a thousand trusts and we get a thousand checks today, all of those checks are actually deposited into one commercial account.

Q. One common account for the whole smear?

A. That is right.

Q. (By Mr. Jenks): Mr. Hogan, to straighten out one thing, it is not state-wide, is it?

A. No, it is an account which pertains to the trust activities at the San Francisco office.

(Deposition of William O. Hogan.)

Q. And other offices of the bank have their own trust activities? A. Yes.

Q. The Central Office in Oakland maintains a trust department, I believe?

A. They do, and they also operate under the same procedure.

Q. But when you say the income, checks, for all trusts are deposited in this commercial account, you are talking about all [29] trusts administered by the San Francisco office? A. Yes.

Q. And does that include more than San Francisco? A. No.

Q. Would Burlingame, for example, have its own trust department?

A. No; the First Western Bank has five local trust departments.

Q. The account which is maintained at the San Francisco main office at 405 Montgomery Street includes more than just that office; in other words, you have other banking offices in San Francisco and they do not maintain trusts or a commercial account of this character?

A. No, they do not.

Q. I think the question was asked about consulting with co-trustees. By the way, how long have you been administering this trust?

A. I have been administering this trust since February 15, 1954.

Q. And do you tie that to the date of the death of Jackson Baker, the former Trust Officer of the Bank? A. Yes, I do.

(Deposition of William O. Hogan.)

Q. During his lifetime Mr. Baker administered it? A. He did.

Q. Since you have been administering the trust have there been any matters to your knowledge where the co-trustees have been consulted?

Mr. Troxel: I think that is immaterial, counsel.

Mr. Jenks: I think he gave an answer to a question indicating that maybe they were not.

A. We have consulted with the co-trustees on so many occasions that I couldn't even approximate how many.

Q. In connection with this trust?

A. In connection with the trust.

Q. Can you give us a general idea of the type of problems as to which you consulted them?

A. We have consulted them on problems pertaining to the assets, whether they are to be—whether certain assets are to be retained or disposed of. We have consulted with them on problems pertaining to all phases of investments connected with the trust and the operation of the fir ranch. I suppose that covers generally what we talked about. There have been consultations which were irrelevant as to the trust in many respects, more of a personality standpoint.

Q. Mr. Hogan, you have been in the trust department of this bank or other banks for approximately how many years? A. For ten years.

Q. Ten years, all in San Francisco?

A. Yes.

Q. And can you tell us from your knowledge

(Deposition of William O. Hogan.)

of trust operations, whether in the mechanical or ministerial job of collecting and disbursing income it is customary for the bank to consult with co-trustees—any bank, your bank or other banks?

A. In the actual routine problem of [31] collecting the income and disbursing it, there would be very few occasions when you would have any need to consult with the trustees unless there was some problem involved in the collection of the income.

Q. As to the books of a trust where there are co-trustees and one of the trustees is a bank, is it customary for the books of the trust, its accounting records, to be kept by the bank? A. Yes.

Mr. Yudkin: May I interject? Is that true here?

A. Yes, it is; and in addition in this particular trust each of the trustees and the beneficiary of the trust, Lynne Leuschner, who is not a trustee, received a monthly accounting of income and disbursements.

Q. (By Mr. Jenks): You spoke of shares of stock in the names probably of the four original trustees; you doubt if there are any in the names of the three successors; you think there may be some in the name of Montgomery Company which is now used as a nominee. When the dividend checks on those stocks come in, can you tell us to whom they are payable, in other words, if the stock is in the name of the original four trustees?

A. Dividend checks are made payable to the registered owners of the certificates.

(Deposition of William O. Hogan.)

Q. In other words, if the four trustees are still the registered owner the dividend check would be payable to all four of them? [32] A. Yes.

Q. Who endorses that check?

A. We endorse those checks with a rubber stamp. That stamp says "Pay to the order of the within named payees. Absence of endorsement guaranteed by First Western Bank & Trust Company," or words to that effect.

Q. (By Mr. Troxel): Are you still endorsing checks made out to a deceased Trustee?

A. Presuming, Mr. Troxel, that we still have certificates in the name of Armin Leuschner — certificates wherein his name appears, the answer is yes, we do.

Mr. Jenks: Endorsing, Mr. Troxel, in the sense in which he says; no names are signed?

Mr. Troxel: Guaranteeing the endorsement.

Mr. Jenks: Meaning the endorsements are guaranteed but no names are signed. Isn't that the way I understood your testimony?

A. There are no names signed on the back of the checks.

Q. (By Mr. Troxel): You are maintaining an account card, in light of that rubber stamp, in the name of a deceased trustee. It is deposited to the credit "Of the within named payee;" this deceased trustee must have a card as trustee with your bank?

A. I would hate to get involved into a semantics discussion with you.

(Deposition of William O. Hogan.)

(Discussion off the record.) [33]

Mr. Jenks: I think that is all the questions I have.

Re-examination by Mr. Yudkin.

Mr. Yudkin: I just have a couple. I think this has gone too far anyway.

Q. When you spoke of this big commercial account that takes in deposits that come in for all the trusts in your office, how do you draw money out of that commercial account to be paid to the beneficiaries of this particular trust?

A. We draw it out by check.

Q. Upon the account payable to the beneficiary, and who signs that check?

A. The check is signed—I believe the bottom of the check requires a signature which is entitled “Authorized signature.” An authorized signature for the signing of checks of that nature would include any officers of the Trust Department in San Francisco and one or two clerks who have been appointed—who have been given that added authority.

Q. One of those names; is that correct?

A. One name.

Q. Was that the way checks were drawn payable to the beneficiaries of this trust up until the time we levied?

A. From the beginning of 1955 until that time is the way they were made up. Prior to that we had a different type of check.

Mr. Yudkin: I have no further questions.

(Deposition of William O. Hogan.)

Further Examination by Mr. Jenks

Q. (By Mr. Jenks): Mr. Hogan, that is true of every trust [34] that you operate, the same type of check is drawn on this same commercial account?

A. It is true with the exception of two trusts wherein the co-trustees have specifically requested that they be permitted to sign the checks also. In that case——

Q. Then as I understand it, the Trust Department has a commercial account with the bank like I personally might have?

A. That is correct.

Q. So the Trust Department owes money to someone and the Trust Department draws a check on its commercial account just like I draw a check on my commercial account to pay my bills?

A. Yes.

Q. (By Mr. Yudkin): In this trust is it correct that the co-trustees of the bank have not requested that their names be on the checks payable to these beneficiaries?

A. They have not requested it.

Q. And their names have not appeared?

A. No.

Mr. Yudkin: That is all.

Mr. Jenks: I do not have any further questions.

Mr. DeLew: I do not.

Mr. Troxel: No questions. [35]

[Endorsed]: Filed December 6, 1956.

[Title of District Court and Causes Nos. 35398-35416.]

REPORTER'S TRANSCRIPT

Hearing on Trial

Before: Hon. Willis W. Ritter, Judge.

Appearances: For the Government: Lloyd H. Burke, U. S. Attorney, Charles Elmer Collett, Assistant U. S. Attorney, by Anthony T. Dealy, Esq., and Godfrey L. Munter, Jr., Esq., Attorneys, Regional Counsel, Internal Revenue Service. For First Western Bank: Messrs. Orrick, Dahlquist, Herrington & Sutcliffe, by Christopher M. Jenks, Esq. For Richard D. Leuschner: M. Mitchell Bourquin, Esq., and George DeLew, Esq., by George DeLew, Esq. For Erida L. Reichert: Messrs. Slack & Zook, by John E. Troxel, Esq. [2]*

Thursday, March 7, 1957, 10:00 O'Clock A.M.

The Clerk: United States of America vs. First Western Bank and Trust Company.

Mr. Jenks: Ready, your Honor.

Mr. Dealy: Ready for the Government, your Honor.

Mr. Jenks: I think we have a question here as to how you want to proceed. I am Mr. Jenks representing First Western Bank and the Trust Company, which is a stakeholder, or one of the stakeholders, one of three trustees. Mr. Dealy represents the Government, who has a tax lien against Mr.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Richard Leuschner. Mr. DeLew, sitting at my right, represents the taxpayer. Behind him is Mr. Troxel who represents Mrs. Reichert, Mr. Leuschner's sister, who is also one of the trustees.

There are two cases, as your Honor probably has seen. There is the case of Leuschner vs. First Western, while it bears the higher number, was actually the earlier case. It was filed originally in the state court.

Mr. Dealy: Counsel, would you permit me to make the opening statement?

Mr. Jenks: I am just telling his Honor there are two cases and let him decide how to proceed.

The Court: Let me say at the outset I have not examined the file in these cases, I know nothing about them, so we will proceed from there. [3]

Mr. Jenks: I just want to tell you what the two cases are, and if Mr. Dealy feels that he should make the opening statement, I have no objection. That case was removed from the state court on March 28, I believe; following the procedure and some authorities, the First Western Bank interpleaded the Government. The Government then moved that case to this Court, but before it was moved the Government filed the case of United States vs. First Western Bank which I think they categorize as a penalty action in which the bank hadn't paid the money to them. That case was filed before the removal to the Federal Court, so that that case, although the second case in point of time, bears the lower number.

In that case Judge Hamlin of this Court per-

mitted us to bring in Mrs. Reichert, one of the other trustees, and the taxpayer as a third party defendant, and that's where we stand at the moment. The two cases have been consolidated for trial. I am not sure they are consolidated in the complete sense; in fact, I didn't move for a complete consolidation, I moved for a joint pre-trial hearing and the joint trial. Judge Harris, however, in announcing his ruling, called it a consolidation, so that's what the order calls for.

The Court: Well, don't you think, in view of what you told me, these two cases ought to be consolidated in the true sense of the word?

Mr. Jenks: I do; the Government contends no, because [4] they claim there is a different issue of law. In the case in which the Government is the plaintiff, U. S. vs. First Western, they claim that there is no defense to the action and that the question of Mr. Leuschner's right as a beneficiary in the spendthrift trust, and to the money in that trust, cannot be raised. We think it can, but the Government says it cannot.

The Court: In view of the nature of the cases, don't you think——

Mr. Dealy (Interrupting): Your Honor, there are two separate legal theories. One is that——

The Court: Well, I know, but the cases are so associated, aren't they, that we ought to hear them both together?

Mr. Dealy: Maybe heard together, your Honor, but not consolidate them in the true sense of the word, because one relates to a specific statute hav-

ing to do with a penalty against the bank. As to that action, that is between the United States and the bank. As to the other, the United States against the trust, against the beneficiary, or against the taxpayer, that is essentially the difference. One is for foreclosure of a lien against the property, the other is a penalty action.

Mr. DeLew: I must state they all involve the very same issues of facts, and that nearly the same issues of law.

The Court: Of course, Judge Hamlin already made the order consolidating them. [5]

Mr. Jenks: I would agree that the Government——

The Court: I guess there is nothing before me on that. The order consolidates them and there isn't anything here about raising the issues whether he ought not to have done it.

Mr. Jenks: I agree with Mr. Dealy's position to this extent: that if your Honor decides for the bank in the so-called penalty action, United States vs. First Western, that does not necessarily determine the issues in the other case. So there is that distinction, I will have to admit, but I think we all agree we should hear them together and brief them together. We can stipulate the facts should apply to both.

The Court: Well, now, what I would like you to do is acquaint me with what these are about.

Mr. Dealy: Your Honor, I was prepared to make the opening statement on behalf of the Gov-

ernment here, and I would like to at this time, if I may.

The Court: All right, go ahead.

Mr. Dealy: The parties have entered into a stipulation here which does cover both cases and is to be accorded the same effect in the two cases. It has been executed by all the attorneys and I would like now to submit it to the Court.

The Court: All right.

Mr. DeLew: Your Honor please, before we go further, just on this point, I want to make it clear, is it stipulated by all Counsel that this stipulation of facts applies to both cases? [6] You will note that it refers only to one, bears one civil number. It is fine with me, but if everybody stipulates to that I think it ought to be on the record.

Mr. Jenks: It was my understanding that it would apply to both, because it was typed late in the evening or in the afternoon by one of the lawyers instead of a stenographer. He didn't want to take the time and trouble of using both boxes, but I think we would all agree it applies to both cases.

Mr. DeLew: So stipulated.

The Court: Well, let the record show that everyone agrees.

Mr. Dealy: I believe I can acquaint the Court with the basic facts in this case. As some of the Counsel here will probably disagree with some of these remarks, but I believe in the main that any disagreement is a disagreement as to semantics and that this is what the Government feels the evidence will show.

In April of 1941, Ida D. Leuschner created a trust with three co-trustees. At all times relevant to both of these actions the First Western Bank and Trust Company, Richard D. Leuschner and Erida L. Reichert were the three co-trustees. At all times relevant herein the three beneficiaries of the trust were Richard D. Leuschner, Erida L. Reichert and Lynne Reichert—

Mr. Jenks: Lynne Leuschner. [7]

Mr. Dealy: All right, Lynne Leuschner.

In 1952 there were certain taxes assessed against Richard D. Leuschner, income taxes for the years 1943, 1944, 1945 and 1947. These assessments now total in excess of \$200,000 owing, and this matter is all set out in paragraph one of the stipulated facts.

The bank was the administrative trustee for the trusts in that it physically handled the property, collecting the income, paid the expenses, disbursed the dividends for the amount owing to the beneficiaries, and the disbursement was usually made at the end of the month, on the thirtieth day of the month.

As the income was received by the trust department of the bank, it deposited all of the income to the commercial account which the bank maintains or which the trust department maintains and in which all the income maintained by the bank go, and it was deposited in the name of the trust department, not in the name of the trust.

The levy was served on the bank July 22, 1955. The Internal Revenue Service served this levy on

the trust department of the First Western Bank seeking all property and rights to property of Richard D. Leuschner for application to the tax liability. This is all set out in paragraph two of the stipulation.

As appears in paragraph three of the stipulation, a [8] final demand was made on the bank on April 5, 1956.

Now, the First Western Bank and Trust Company has paid nothing to the United States under this levy and final demand, but has segregated the amounts which it would otherwise have paid to Richard D. Leuschner and at the present time totals approximately \$14,000. However, the bank has continued to make payments to the other beneficiaries of the trust in the usual manner. And so the segregation of funds applies only to the share of Richard D. Leuschner.

Now, there is no dispute, your Honor, as to the amount of money now held by the bank segregated for Richard D. Leuschner. The Government will accept the bank's figures on that, so as an accounting problem, there is nothing of that nature in this.

This trust, I might say, was a trust commonly known as a spendthrift trust, and it was also a wasting trust in that there were portions of capital or principal as well as income distributed.

In March of 1956 Richard D. Leuschner brought the first action here, which Mr. Jenks has mentioned today. He brought the action against the bank and the other trustees, claiming that the bank

held money due him, seeking to force the payment to him of this money. At that time the bank filed a cross complaint seeking to interplead the United States, naming the United States as a party. This action, incidentally, was filed [9] in the state court at which time, after the United States was named in the cross-complaint, the United States removed the action to this Court where in that action we now seek to foreclose the lien, the tax lien of the United States which we have against the property of Richard D. Leuschner. We seek to foreclose that lien against his money now held, or rather, against the interest of Richard D. Leuschner now held by the bank.

The following month, in April of 1956, the United States began a separate action against the bank to collect a penalty which is formally referred to under the 1939 Code as a 3710 penalty and has been provided for under the new Code as under section 6332 of the 1954 Code. Now, this action is brought under the new Code.

The penalty action is premised upon this theory, the section which was enacted by Congress, that when a levy is made by the United States upon a person or upon a company or bank that holds property of a taxpayer and is seeking to seize that property for the payment of taxes, to avoid unnecessary and controversial litigation without any merit, Congress provided that if the party failed to pay over what they held in their hands they were liable for a penalty, that penalty to be measured by the amount of the property or money that

they failed to pay over, and that action has nothing to do with foreclosure of a tax lien, it has nothing to do with anything else. It's merely a penalty against the bank measured by the amount that [10] they failed to pay over.

The Court: You mean the Government is entitled to get paid twice?

Mr. Dealy: We are stating, your Honor, that as a practical matter, the way this works the Internal Revenue Service has, as a policy matter, applied the penalty against the taxes and thus discharging that portion of that taxes, whatever it is. However, the Government does not contend that we are, in the penalty action, collecting any portion of the money held by the person who is holding it. We are levying a penalty completely separate. The statute is very clear on that.

Now, these matters have been consolidated for trial, or at least for joint hearing, if nothing else, and the Government's position is that by the service of the levy the Government seized all rights of Richard D. Leuschner under the trust and we are entitled to receive the monies that were payable or became payable to Richard D. Leuschner under the trust. In other words, we were seizing his property right in this trust, and the action of the bank in failing to pay over to the United States the money that they held then or they later segregated as payable to Richard D. Leuschner, was wrongful and subjected themselves to the liability of the 6332 penalty, as provided by Congress.

The Court: It reminds me a little bit, if I may

digress a moment, it reminds me a little bit about Governor Lee up in Utah. He had a bank account down at the Walker Bank and Trust Company. [11] He refused to pay his income taxes. And the Bureau sent one of these summary levies to take it out to the bank and pick up the bank account. The bank, when the agent showed up, called up Governor Lee and said there is an agent here to pick up your bank account. We want to let you know about it and we think we are under some obligation to do it and the bank doesn't want to suffer a penalty, so Governor Lee very graciously said, "Well, do whatever you need to do to protect the bank." So the Government picked up his income tax and that ended that.

Mr. Dealy: That, your Honor, in a nutshell, is precisely what the United States was trying to do here.

There is just one other point I would like to bring out right now for your Honor and that is that the bank contends that they are entitled to some of the accounts—I think maybe other Counsel than the bank, but certainly the bank contends that they are entitled to attorney's fees in this case for the reason that the trust instruments provide for attorney's fees where there is a dispute with regard to the trust. However, the United States does not feel they are entitled to anything, for the following reasons: We feel that in refusing to make payments to the United States under the levy the bank was acting on its own, in its own capacity, not on behalf of the trust, and it wasn't

in that case seeking to protect the trust because there was no justification for failing to honor the levy. [12]

The cases are clear on the fact that honoring the levy of this nature is a defense to subsequent payment to the holder of the bank account or the property or whatever it is. Certainly in that case, the bank being subject to the levy is not now entitled to come in and say, "Well, we were just seeking to protect the interests of the trust in refusing to honor the levy and that we are entitled to attorney's fees." If by creating the problem which we have here the bank can attorney-fee the fund to death I think the Court can see that whenever the United States makes a levy of this nature the bank's attorneys or anyone else interested could get a nice fee out of it by simply going to court and making a contest. For that reason the Government feels this is not——

The Court: Well, I wouldn't think that would be material unless you could prove that is what they do.

Mr. Dealy: Well, your Honor, I believe the fact that they failed to honor the levy in the face of the decisions which hold that they must honor the levy and by honoring the levy they have a defense to making subsequent payment indicates the bank did not have any justification for failing to honor the levy and therefore is entitled to no attorney's fees.

The Court: Well, I think I understand what your position is.

Mr. Dealy: I believe that is the Government's position in the case. [13]

Mr. Jenks: Your Honor please, I think at this point I should make the bank's position clear on certain matters, although your Honor will either want oral argument later or briefs. I believe at least the Government counsel is going to suggest briefs.

The Court: I might say at the outset I prefer to have it argued out orally.

Mr. Jenks: I prefer that myself.

The Court: I think when we have us all together here, anything that occurs to the Court he can ask about, and I have found in our adversary system, you know, we pit you two fellows together and you beat it out in argument, the Court can interject a question here and there, and pretty soon we see where the things lie, probably. I prefer to do it that way. If I take those briefs back in chambers and get to reading them, I might have a lot of questions about them and nobody there to answer them.

Mr. Jenks: I prefer it that way myself.

Mr. Dealy: In line with that, your Honor, the Government would like in any case to brief the matter for the Court, but we will be perfectly willing to argue the matter orally, but would like to request permission.

The Court: You can brief it if you want to, but I think we will arrive at our result right here in argument.

Mr. Jenks: In presenting the bank's position,

[14] your Honor, on the so-called penalty action, first I call your attention to the fact they insist it is a penalty and a penalty action; that immediately brings into play the fact that this statute must be strictly construed.

Now, the notice of levy here (you will find it attached to various pleadings) is not addressed to the three trustees and is not addressed to the bank. Remember, now, we have to construe these statutes strictly. It's addressed "Trust Officer, First Western Bank, formerly San Francisco Bank, San Francisco, California. Account trust in which Richard D. Leuschner is partial beneficiary."

The notice of Levy, as Counsel said,—

The Court: Let me get that straight before we go on. What is the name of the bank?

Mr. Jenks: First Western Bank and Trust Company; it used to be the San Francisco Bank.

The Court: At the time that is important in this case it was the First Western Bank and Trust Company, is that right?

Mr. Jenks: That is right. The point of this—there are two points. One, one if they are seeking or claiming that by this notice of levy they reached Mr. Leuschner's interest in the trust, as distinguished from any money which the bank might then hold, the point is, first, this wasn't even addressed to one of the co-trustees, it was addressed to an officer, trust officer. Second, it is an admitted fact that the other two [15] co-trustees did not receive a notice of levy. It will be argued, I know, by the attorney for the taxpayer as well as the

attorney for the other trustee, that they cannot seek a levy on an interest in the trust without serving the three co-trustees who hold that interest.

Admittedly, the bank, having the bookkeeping facilities right from the beginning of this trust, has collected the income and distributed it after having paid the expenses, distributed the net to the beneficiary. That's the first one we want to direct your attention to.

The Court: Yes.

Mr. Jenks: The second thing is this: This trust provides for monthly payments and from the inception those monthly payments have been made on the last banking day of the month.

The notice of levy was received by an assistant trust officer on July 22. It will be our position that at that time nothing was owed to Richard D. Leuschner. He is merely a life income beneficiary under this wasting trust. Although I use "life income" a small portion of the principal is distributed each year. Should Richard D. Leuschner have died on July 23, 24, or 25, no money would have become payable to him; it would have gone, under the terms of the trust, to the remainder of his children, so it will be our position on July 22 when the levy was received there was nothing held by [17] the bank for Richard Leuschner. There was a trust held by three co-trustees, but not by the bank.

The notice of levy itself reads as follows, your Honor:

"Accordingly, you are further notified that all

property, rights to property, monies, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer are hereby levied upon * * *"

It will be our position, this having been served during the month, we didn't owe Richard Leuschner a cent. And it is our position that even if you can hold that the bank as one and only one of three trustees, held this inchoate interest of Richard Leuschner in the spendthrift trust, even if you can hold that this levy does not catch money which later became available — remember again, your Honor——

The Court: Will you read the language of that levy again?

Mr. Jenks: Yes, and I want to read the language of the final demand. The language of the levy:

"You are further notified that demand"——

The Court: This is addressed to the trust officer?

Mr. Jenks: The trust officer of the bank.

"Accordingly, you are further notified that all property, rights to property, monies, credits, and [17] bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer are hereby levied upon and seized * * *"

Now, some months later, and on April 6, 1956,

after Mr. Leuschner had filed his own suit in the state court, after the government had been served with a notice of motion for permission to bring, to interplead them as cross-defendant, a final demand was served on the bank. The final demand was served, because under the terms of this penalty statute, section 6132 of the Revenue Code, the demand is a prerequisite to the suit against the stakeholder.

Now, I am going to read you the final demand, reminding you again that on July 22 the bank was not indebted to Richard Leuschner.

“Demand is again made for the amount set forth in the notice of levy, \$207,665.42, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served.”

Now, that is the demand on which they have based this suit and under which they claim they are entitled to collect from the bank as a penalty fifteen, a little over \$15,000 to date.

I might say that when the levy was served we didn't owe [18] anything to Richard Leuschner, didn't owe him a dime unless he lived to the end of the month. When notice of demand was served April 6 we had a little over \$5,000 which had accumulated in those few months.

Now, looking at the statute itself I believe that the statute requires successive levies and does not permit a penalty action to recover funds which have accrued since the first levy. I base that not only on the language of the statute and the language of the demand, but upon this fact: The stat-

ute provides for the penalty that you pay to the government the amount of money which you had owing to the taxpayer at the date of levy with interest at six percent from the date of the levy, and it should be obvious to anyone that the \$600 or more which became payable to Richard Leuschner at the end of February cannot, under this statute, be subject to interest at six percent from the date of the levy on July 22nd, 1955. And the same is true of the money that became due in January, and right on back. So I say by the terms of this very penalty statute the only penalty is on what the bank had on July 22, which was nothing. That is admitted.

The question of attorney's fees comes up in two ways, your Honor. I was interested in the fact that Mr. Dealy said, apparently now admitting that the interpleader action initiated by Mr. Leuschner is proper, that in the interpleader action they will seek to foreclose the lien. [19]

Now, if we go into the interpleader action, if we were to deposit the money in court today, if we had deposited the money in court at any time during the past year and a half — we didn't because negotiations, we hoped this matter could wash itself out — if we had, and we have always said we are willing to, still willing, then as an interpleader matter, although there is slight authority to the contrary, we believe the great weight of the evidence of authority entitles us as interpleader stakeholders to attorney's fees out of this fund, attorney's fees and costs.

But there is another situation here and it also becomes a part of the penalty action. The trust agree-

ment itself provides that in the event of a controversy as to the trust or any shares thereof or portion thereof that the trustees are not required to determine that controversy and may withhold that share, withdraw it, until the rights to it have been determined legally and shall be entitled to all expense, including attorney's fees.

I think in the interpleader action the Court would have to allow the amount of attorney's fees. We haven't billed the bank yet. We felt, we wanted to be fair with everyone and present the matter to the Court. But I think if it is under the trust the Court merely says bill the bank and doesn't say attorney's fees.

I will tell you this, as I told Judge Harris the other [20] day in the pretrial, we have now put in in our office, mostly my own time, considerably over 100 hours. If I were billing the bank on this today I would bill \$3,500. I think my fee would be 130 or 135 hours. That would include my time and my associate who is in the courtroom. That would be the bill we would put in.

But I think that that provision of the trust is important not only as to attorneys' fees, but also on the penalty action. When the controversy arose the co-trustees under the terms of the trust were not required to determine the controversy, and until that time the controversy was determined no sum of money has become payable to Richard D. Leuschner, because the trustees are permitted, by the terms of their contract, not to pay until the controversy is decided.

So even if your Honor were to hold that the levy would tax future sums and that the bank must pay a penalty for failing to deliver those sums, if your Honor were to hold that, I think your Honor still must give judgment to the bank in the penalty action, because no sum has yet become payable to Richard D. Leuschner. There is still this controversy; there is still this controversy as to Richard D. Leuschner as beneficiary of the spendthrift trust. He certainly served notice on the bank that he felt that that trust was superior to the federal lien. He did that when he filed the first suit here, *Leuschner versus the bank*. [21]

I might point out, your Honor, that—I don't know what argument counsel will make—I know of cases one way and the other, and that is for them to decide, whether the spendthrift trust is good against the lien or not. That's not my problem. But Richard D. Leuschner, by filing the first action, said it was; he raised the controversy.

Now, from that point on, until that controversy was determined, nothing has become payable to him, and the government has said that the controversy will be determined in the interpleader action—Mr. Dealy just said that; that *Leuschner versus First Western versus the United States* they will seek to foreclose the tax lien. And at that point, if they succeed in foreclosing, the controversy will be determined, and for the first time since July 22, 1955, a sum of money will be payable to Richard D. Leuschner, but under the terms of the trust it is not payable to him.

I think this: If Mr. Leuschner were to die during this month—this isn't our problem—I think it may be payable to his estate, rather than to the remainder. But I don't have to cross that bridge here. It is the bank's position that we are purely the stakeholder; we are caught in the middle, one of three co-trustees of a spendthrift trust created by the mother.

I might add this: Somebody is going to have to tell you, we have a peculiar dollar situation here. The [22] government's lien is \$207,000, with interest at six percent, which is over \$12,000 a year. Payments to Mr. Leuschner have been running about \$8,000. So that if the government takes everything out of this spendthrift trust that could be payable, as Mr. Leuschner lives from month to month, it still will not pay the interest. The debt to the United States will still grow, and Mr. Leuschner will have to find some way of paying the tax on the income which the government takes out of the spendthrift trust.

I think with that kind of a controversy presented and first brought into court by the stakeholder in a case in which the United States is now a party, that there is no basis for the penalty action.

Now, you can give a stipulation of facts—I assume at this point you think there is no evidence. However, there is one point not covered by the stipulations, Mr. Dealy—I thought maybe you were going to call him—Mr. Hogan, the assistant trust officer who has been handling this trust is in court, and I believe somebody should call him as to the

exact amounts presently involved. If nobody else will, I will call him.

Mr. DeLew: Could I make a statement?

Mr. Jenks: All right.

Mr. DeLew: Before taking any evidence, whatever it may be, I thought it a good idea to make our opening statements [23] before there were any evidentiary matters, and I just want to state to you the position of Richard D. Leuschner.

His position in this matter is that of the taxpayer, or the alleged taxpayer. In the case involved here we say that no levies have been made at all; no effective levy has been made in this case of any kind. The statement of facts, the original of which you hold, has attached to it the original of what they are pleased to call "Notice of Levy." That is a notice designed to be what it says to be, a notice. It is not the levy. The method used by the government in this case to suggest a levy and which has been called both by counsel for the government and for the bank as a levy is not a levy at all, and the method used has been stricken down in three separate cases, which I will give you in due season.

Now, furthermore, as counsel for the bank has pointed out, the notice of levy, even as a notice, is directed only to "Trust Officer, First Western Bank." The trust instruments, which I don't think there is any disagreement about, and which is attached to the complaint, and we will give you another copy so that it is handy — attached to the complaint in the first of these suits sets forth quite definitely that the title to all property is in the trus-

tees therein mentioned, and today there are three trustees.

Furthermore, in order to maintain the action as against the government and the bank, under Code Section 6332 (b), [24] which is referred to in government's complaint, three conditions must be present: The person on whom a levy is attempted must be in possession of the property, a valid levy must be made, and the property sought must be subject to levy.

Now, the possession of trust property is in the trustees. I think it is Hornbrook law—I don't think anybody will dispute the fact that the possession of the property is in the hands of the trustees. It is true in this case that certain ministerial acts, as clerical acts, were performed. Actually, the funds consisted of a number of stocks in this case.

The Court: That is Hornbrook law, too, isn't it, that trustees may not delegate their responsibilities?

Mr. DeLew: I think that's correct. They cannot delegate it. It is just as if a clerk in my office wrote out checks; that doesn't put him in possession of the funds. And there I think the attempt to give the so-called notice of levy to a trust officer of one of the trustees is sufficient to destroy the effect of that levy.

Now, furthermore, as will be seen, the type of trust we have here is the so-called spendthrift type of trust. In other words, persons create this type of trust for improvident persons, and it cannot be alienated. You are quite familiar with that type of

thing, and I shan't go on. But it is a type of trust which is usually called a spendthrift trust, [25] and I think everyone will agree.

Now, under the Code section of this State, Section 859, it is there provided that where a trust is created to receive the rents and the profits of real and personal property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of a person for whose benefit the trust is created, is liable to the claims of the creditors of such persons.

Now, in this trust there is no provision in it for the accumulation of any income. As a matter of fact, there is a positive provision that the income be paid out. Obviously, in this case the education—our man in this case is 53 years of age; his education, well, we can forget that—the support is the portion that we are dealing with here.

Now, the support, the amount of the income and profits of this trust beyond the amount necessary for his support, and that includes support for himself and family, as the cases say, is available for creditors' claims such as that of the government.

Also, in this stipulation of facts you will note—it is in the last paragraph—that there it is provided that if Mr. Leuschner took the witness stand he would testify to the very same expenditures as provided for in an affidavit that has already been on file. That affidavit provides for [26] expenditures of approximately \$750 a month, which is a modest enough amount to get along on.

Now, if your Honor please, we claim that the spendthrift trust is not subject to the claim of the government under this Code section.

The Court: Because of the support provision?

Mr. DeLew: Because of the support provision of the Code, if your Honor please, and because——

The Court: This Code provision, I am not familiar with it, of course. I am familiar with spendthrift trust situations. Now, do you understand this Code provision to invalidate the spendthrift trust provision unless that is beyond the extent which the funds are necessary for education and support?

Mr. DeLew: Yes, your Honor.

The Court: That's the effect of it?

Mr. DeLew: Yes, your Honor.

The Court: So you stand or fall, so far as this point is concerned, upon the question of support?

Mr. DeLew: Yes, your Honor.

Now, furthermore, we claim this is a right of property, and that it must be respected by the United States, and we will get to that in due season.

Now, furthermore, it is the Defendant Leuschner's position in this case that he was adjudicated a bankrupt not so [27] long ago. Now, in the bankruptcy proceedings, when he filed his application for petition in bankruptcy—pardon me—he listed the government as a creditor. The government filed a creditor's claim. Furthermore, he listed the spendthrift trust in the petition and claimed it to be exempt.

Now, in due course, the trustee, who represents all the creditors, took issue with him on the ex-

emption claim by reason of this spendthrift trust.

The matter was heard before the Referee and it was decided in that case that the spendthrift trust was free of the claim of all the creditors, including that of the United States, because it was needed for his support. It was exempted under that provision of 859, and that judgment has become final.

The Court: Who determined that?

Mr. DeLew: The Referee, if your Honor please—the Referee in Bankruptcy, in the Bankruptcy Court, before a contested hearing in that place.

The Court: Bankruptcy in this court?

Mr. DeLew: Actually it was in the United States District Court, yes, but for the Southern District.

The Court: Southern District of——

Mr. DeLew: Of California.

The Court: ——California?

Mr. DeLew: Yes. I have the certified copy of the [28] proceedings.

The Court: All right.

Mr. DeLew: Now, we take the position that is res judicata here, has been estopped by judgment. The government was in the matter, they had filed claims. They did nothing. The matter could be appealed from. The government had a priority claim, as far as that is concerned, right there. They did nothing. And the cases will bear me out to the effect that that is res judicata and determinative of the issue here.

And with that, if your Honor please, I will close, at least this opening statement. Thank you.

Mr. Troxel: If your Honor please, on behalf of

Erida Leuschner Reichert, who is one of the co-trustees, I would like to state her position.

At the time that the notice of levy was first served on the trust officer of the First Western Bank Mr. Jenks, on behalf of the bank, telephoned our office, knowing that we were attorneys for Mrs. Reichert, and advised us that the notice of levy had been served, and at that time a decision was reached between the two offices that unless the levy was served on all three trustees that there would be no payment made to the United States, because it was our belief that the levy wasn't valid.

Immediately, at the same time, the information was passed [29] on to Mr. Leuschner, the beneficiary, and he informally demanded the payment to himself.

A controversy arose within the course of a day or so after the service of the original notice of levy, and we feel that a system which the government contends is valid, of serving one trustee and taking trust assets, because they have in their opening statement said that they want to obtain all of his right, title and interest in the trust, by serving a trust officer of a co-trustee, puts the trust situation in a very precarious position.

The controversy arose. The bank did its withholding in good faith, and all parties, the co-trustees, have been brought into this; my client was brought in without choice—she is a stakeholder as to her trustee interest; she offers to interplead, so filed an interpleader, and in the action moved successfully in the District Court here to have the

United States brought in as a third party defendant. We do wish to present to the Court that fact, that the controversy did arise under the terms of the trust agreement at the time that the levy was served and the discussions were had between the attorneys for the various trustees.

That is our position, and we will maintain that during the conduct of this proceeding.

The Court: Very well.

Mr. Dealy: Your Honor, on behalf of the government I [30] would like to call Mr. Hogan, who is one of the trust officers of the bank.

The Court: All right.

Mr. DeLew: Your Honor, please, — excuse me, Mr. Dealy—I have a little memorandum of points and authorities. May I submit these now for the Court's guidance?

The Court: Yes.

WILLIAM HOGAN

was called as a witness on behalf of the Government, and after being duly sworn, testified as follows:

The Clerk: Please state your name and occupation for the record.

The Witness: My name is William Hogan. I am assistant trust officer, First Western Bank and Trust Company.

Direct Examination

Q. (By Mr. Dealy): Mr. Hogan, how long have you been the assistant trust officer at the bank? A. Since 1947.

(Testimony of William Hogan.)

Q. How long have you been with the trust department of the bank?

A. Since 1946, in January.

Q. Are you familiar with the facts relating to the Leuschner trust which I believe the bank designates as "P-109"? A. Yes.

Q. That is the trust here in question, is that right? [31] A. Yes, it is.

Q. Would you describe to the Court the manner of the trust administration and the bank's position in the administration of the trust?

Mr. DeLew: If your Honor please, I think we ought to have at this point the trust in evidence, so that the testimony will make more sense.

Mr. Dealy: I believe—didn't you say the trust agreement is attached to the——

Mr. DeLew: To the complaint. But I think it ought to be in evidence at this time so the record will be clear as to the matters involved here.

Mr. Jenks: Attached to the complaint in the action of Leuschner against First Western Bank and Trust Company, No. 456,519.

The Court: All right, proceed with your examination.

Mr. Dealy: I don't feel there is any need to put it in evidence.

The Court: All right, proceed.

Mr. Dealy: Will the reporter repeat the question, please?

(Question read by the reporter.)

A. There are three trustees of the trust, but for

(Testimony of William Hogan.)

convenience purposes the bank has always collected the income, safeguarded the securities and disbursed the income at the last [32] business day of each month.

The bank has also initiated any portfolio changes in the trust.

You want more?

Q. (By Mr. Dealy): Would you describe the properties that are held by the trust?

A. In detail?

Q. Well, just the general type.

The Court: What classes of stock?

Q. (By Mr. Dealy): Stock, or bonds, or what?

A. Well, six percent of the—the trust has an approximate value of \$306,000. \$17,900 of value, or six percent of the trust, is in preferred stocks; 81 percent is in common stocks that have a value of approximately \$248,000. There is a promissory note secured by deed of trust which has a balance of approximately \$18,000; that comprises six percent of the trust. And there is real estate in Merced, California, approximate value \$20,000, which is about seven percent of the trust.

Q. Now, referring to the administration of the trust, did the bank collect the income from the trust properties? A. Yes.

Q. What did the bank do with that income?

A. When the income is received by the bank it is deposited to the account of this particular trust.

Q. The trust has a particular separate account?

A. On our books it does.

(Testimony of William Hogan.)

Q. What does the bank do with the money?

A. The bank has one commercial account in which all funds are deposited, but the trust department keeps a separate record for each trust.

Q. The trust department, itself, keeps a separate record for each trust, is that correct?

A. Yes.

Q. But the trust department deposits the money in the commercial account of the bank, is that correct?

A. Yes.

Q. Is there any segregation of the funds in the commercial account as belonging to any particular trust?

A. No, if one were to look at the commercial account which is maintained by the trust department they would probably find there is eight or nine million dollars in there. But the trust department knows how much of that money belongs to each account that it administers.

Q. Now, how does the bank pay out the dividends or proceeds to the beneficiaries?

A. On the last day of each month we disburse 40 percent to Mr.—under the terms of the trust 40 percent is supposed to go to Mr. Leuschner, 40 percent to Mrs. Reichert, and 20 percent to Miss Lynne Leuschner. [34]

Q. Is this done by check? A. Yes.

Q. Check of the bank? A. Yes.

Q. How are those checks drawn?

A. They are drawn against the commercial account.

(Testimony of William Hogan.)

Q. Who signs those checks?

A. Any authorized officer of the trust department may sign those checks.

Q. At the time these distributions are made are other trustees consulted?

A. No, but along with the check—the check is accompanied by a monthly report of receipts and disbursements.

Q. Was a notice of levy served on a trust officer or assistant officer of your bank on July 22, 1955?

A. Yes.

Q. Who was that officer?

A. Well, I think it was Mr. Flynn.

Mr. Jenks: I think he would recognize the person if you would show him the document.

Mr. Dealy: I don't have it here. That's all right; I believe it is Mr. Flynn. Yes.

Q. On the day of the levy where was this trust income that had been accumulated for the trust being held by the bank?

A. The money that had been accumulated since the 1st of [35] July was on deposit in that commercial account.

Q. All right. Was a final demand served on the bank? A. Well, I suppose it was.

Mr. DeLew: That is in the stipulated facts, your Honor.

Mr. Jenks: You might have a question of semantics there, as to serving the bank. It was directed to the trust officer, received by Mr. Hogan on April 6, 1956.

(Testimony of William Hogan.)

The Court: Also requires this witness to draw a conclusion of law as to whether it was a final demand.

Mr. Dealy: I can address the question. Was it served on Mr. Hogan?

The Court: Well, if it is covered by the stipulation, why bother with it?

Mr. Dealy: All right, your Honor.

Q. Now, between the date of the levy and the date of the final demand were payments made to the other beneficiaries of the trust? A. Yes.

Q. Was this in accord with the same practice of making out a check at the end of each month?

A. Yes.

Q. Now, what was done with the money that was allocated or segregated or set aside for Mr. Leuschner during that period? What was the procedure with that?

A. Well, first we simply set up what we called another cash [36] account.

Q. A what?

Mr. DeLew: We ought to set up the time element here. You mean immediately between the final demand and the levy?

Mr. Dealy: Between the date of the levy, July 22, 1955, from that day on, what was done with the money that was allocated for Mr. Leuschner?

Mr. DeLew: You mean the notice of levy.

Mr. Dealy: The notice of levy.

The Witness: In order to keep track of how much money we had not distributed to him we

(Testimony of William Hogan.)

would draw a check against—not draw a check; probably make some sort of a debit entry against the trust, and credit what we called “P-109 (a),” on which we had placed his name.

I think after a period of time when the money started to accumulate into a considerable amount we felt that perhaps we might be criticized if this money was not earning interest. So we placed it in a separate savings account in the bank, and every three months we distribute, or we deposit into that savings account the amount of funds which we have accumulated during that period in this so-called P-109 (a) account.

Q. (By Mr. Dealy): What is the reason for doing that every three months?

A. Well, it is for our convenience, and there would be no difference in the amount of interest that is paid. In other [37] words, if you were to make a deposit in any bank today you would not start to earn interest on it until April 1st.

Q. When this savings account was set up were the other trustees consulted?

Mr. Jenks: If you know.

A. I don't think they were consulted, but I think that they were informed, but I do not know for sure.

Q. (By Mr. Dealy): Can you state how much the present amount is now that this—at this time—that is now segregated to these—I suppose you have two accounts; you have a savings account and the other account, whatever it is?

(Testimony of William Hogan.)

A. Well, in the savings account there's a total of \$14,395.81.

The Court: This is our usual time to take the morning recess, if this is a good point at which to stop.

Mr. Dealy: If we can get these other figures.

A. (Continuing) In the commercial account there is in the so-called P-109 (a) account, there is \$1,263.74.

Mr. Dealy: All right, your Honor, I think this would be a fine place to take a break.

(Short recess.)

Q. (By Mr. Dealy): Resuming where we left off, Mr. Hogan, I think I have one, or possibly two more questions. Can you tell me, on July 22, 1955, the amount of money which was on the trust department books credited to the Leuschner trust [38] account in the commercial account?

A. No, I can't tell you how much was on deposit on that very day. But I do know that if this notice of levy had not been served, that on the 31st of July we would have sent Mr. Leuschner a check for \$687.67.

Q. But you do not know to the exact amount what was on file for the whole trust, is that correct?

A. Well, on the 31st—

Q. On that one day?

A. No, I'd have to get that information for you.

Mr. Dealy: I believe that will conclude the examination for the government.

(Testimony of William Hogan.)

Mr. Jenks: I have a couple of questions, your Honor.

Cross Examination

Q. (By Mr. Jenks): Mr. Hogan, I am looking at the agreement of trust dated the 16th day of April, 1941, by Ida Denicke Leuschner as trustor. I think we should identify some of the parties.

Is it correct that Ida Denicke Leuschner was the mother of Richard Leuschner and Mrs. Reichert?

A. Yes, that is correct.

Q. And I believe there was another child, Frederick Leuschner?

A. Yes.

Q. Now, the original trustees were the bank, Armin O. [39] Leuschner, Erida Leuschner Reichert, and Richard D. Leuschner.

Is this correct: that Armin O. Leuschner was Mr. Leuschner's father?

A. Yes, sir.

Q. And he died?

A. Yes.

Q. So that the present trustees are the bank, Mrs. Reichert, and Richard D. Leuschner?

A. Yes.

Q. Frederick Leuschner also died, did he not?

A. Yes.

Q. And he left a daughter, Lynne Leuschner?

A. Yes.

Q. So at the present the three beneficiaries are Erida Leuschner Reichert, both beneficiary and trustee, Richard D. Leuschner, both beneficiary and trustee, and Lynne Leuschner, who is only a beneficiary?

A. Yes.

(Testimony of William Hogan.)

Q. Now, there was a reference made here today to the fact that this was a wasting trust. Can you tell us just how the wasting takes place in this trust?

A. I believe the trust instrument provided that on January 1st—that was ten years after the creation of the trust—that the trust was to be valued at that time; and then monthly we were to distribute one percent of the value of the trust [40] on that particular day, and I think it was January 1, 1951.

Q. In other words, each month, in addition to distributing income, you distribute one percent of the principal divided among the three beneficiaries?

A. Yes. There is a theoretical wasting of 12 percent of the value of the trust in 1951, each year.

Q. In other words, theoretically it is one percent a month, or twelve percent a year?

A. Yes.

Q. However, because of either fortuitious investment or the rising prices in the stock market, the net value has not wasted, has it?

A. No, the net value has increased, as a matter of fact.

Q. Has increased.

The Court: Might turn around any day.

Mr. Jenks: It might turn around sharply, your Honor.

Q. You spoke of real estate in Merced. That's a fig ranch?

A. Yes.

Q. What is commonly referred to as a fig ranch. Mr. Hogan, so far we sent you a bill for our legal

(Testimony of William Hogan.)

fees in this case, and it has been charged against the trust? A. I have not seen it.

Q. You haven't seen it. And it would go through your hands? A. Yes, I believe it would. [41]

The Court: Well, you stated you haven't billed.

Mr. Jenks: We haven't billed.

The Court: You have already stated that.

Mr. Jenks: That's right. I thought maybe they wanted the evidence.

Those are the only questions I have.

Mr. DeLew: May I ask a few questions?

The Court: Surely.

Cross Examination

Q. (By Mr. DeLew): This won't be long, Mr. Hogan. You testified that you were with the bank as assistant trust officer since 1947, is that correct?

A. Yes.

Q. How long have you been in charge of this particular trust, the Ida Denicke Leuschner trust?

A. Since February 15, 1954.

Q. That was following the date of Mr. Jackson Baker? A. That is the day he died.

Q. And Jackson Baker, the trust officer for the bank, was in charge of this particular trust?

A. Yes, he was.

Q. Prior to that time. Now, you made a statement that since you have been in active charge of this bank—that is, active charge of this trust, and that has been since 1954, you initiate portfolio changes. Did I quote you correctly? [42]

(Testimony of William Hogan.)

A. I said that.

Q. Yes. Now, by "portfolio changes," you refer to the list of stocks and bonds that are in this trust, is that not right?

A. Well, let me put it this way: We have a trust investment committee.

Q. Yes.

A. And this trust is reviewed periodically. It is also subject to special reviews. If there is a time when we can see that there will be a need to raise additional funds to meet these principal distributions, why, it comes before the committee once again, and we will make certain recommendations that something should be sold or something should be purchased. But before we do anything, that simply is the committee's recommendation, we then communicate in writing with each of our co-trustees and inform them that our committee has recommended this particular change, and we would be pleased to have them concur with the recommendation. Nothing is done until we have the consent of at least two of the three trustees.

Q. I see. Then I can make the statement that you consult with the other trustees before making any change in the trust investments?

A. Yes.

Q. And they all consist of stocks and bonds. So the income [43] merely is by means of dividends or clipping coupons?

A. And also there is the——

Q. Except the fig ranch in Modesto?

(Testimony of William Hogan.)

A. Yes.

Q. That is actually running at a net loss, isn't that right?

A. Well, last year on the basis of the figures that we had it made \$87.00, and we presume we will receive additional funds when certain dried figs are paid for.

The Court: Like my cattle ranch in Idaho.

Mr. DeLew: I think I would rather have a cattle ranch.

The Court: The loss is greater. I should think you would make money on the fig ranch.

The Witness: Well, people don't like figs too well.

Q. (By Mr. DeLew): Now, if the trustees refuse to give this consent to the change in the portfolio—that is, the selling or purchasing of additional securities—does the bank purchase or sell them, anyway?

A. Not on our own, we do not.

Q. Where does Mrs. Erida Reichert live?

A. She lives in Maui, the Hawaiian Islands.

Q. Mr. Richard Leuschner lives——?

A. Down in Merced.

Q. That is the means you have all adopted to communicate and consult with one another, this medium of correspondence? [44]

A. Yes. But that is not the exclusive means. There have been occasions when we have had conversations either on the telephone or in the office of the bank. And Mrs. Reichert is only a recent

(Testimony of William Hogan.)

resident of the Hawaiian Islands, and she does travel back and forth on occasion, so we see her personally.

Q. In other words, there are consultations between you and the other trustees before you make any changes or any vital, any important, changes in the trust whatsoever? A. Yes.

Mr. DeLew: Thank you.

The Court: My understanding of the law is that all three trustees must concur. Don't you agree?

Mr. Jenks: Not under the California law.

The Court: Not under the California law?

Mr. Jenks: No; a majority, two out of the three.

The Court: Oh, I see. You must be sure and tell me about the California law.

Mr. Jenks: Two out of three.

Mr. Dealy: No further questions.

The Court: All right.

Mr. Jenks: Thank you, Mr. Hogan.

(Witness excused.)

The Court: That is by virtue of the Code?

Mr. Jenks: Except possibly, if your Honor wishes testimony as to the amount of time our office has put in on this [45] matter.

Mr. DeLew: Well, the judge just said the record is closed.

The Court: No, no. I said by virtue—the trustees being able, by a majority, to run the business, that is by virtue of the Code provision.

Mr. Jenks: The Code provision, yes, your Honor.

The Court: I see.

Mr. Jenks: As far as I know, the only other possible evidence here would be evidence from our office as to the amount of time we have put in.

The Court: Well, suppose we defer that for awhile. I don't mean by that to suggest we have made up our minds about it at all.

Mr. Jenks: All right, your Honor.

Mr. Dealy: We have no further evidence, your Honor.

The Court: All right.

Mr. DeLew: Your Honor please, I have just once piece of evidence, if Mr. Leuschner will take the stand for just a moment.

The Court: All right.

RICHARD D. LEUSCHNER

was called as a witness in his own behalf, and after being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. DeLew): Mr. Leuschner, you are the plaintiff in the first of these two suits, and one of the third party defendants in the other suit, is that not right? A. Yes.

The Court: Your name is Richard D. Leuschner?

A. Richard D. Leuschner, yes, your Honor.

Q. (By Mr. DeLew): Now, you have prepared and filed with this Court an affidavit dated May 17—sworn to on May 17, 1956, in which you indicate a total of \$750 is necessary for your support. Do you recall such an affidavit?

(Testimony of Richard D. Leuschner.)

A. Yes.

Mr. DeLew: Now, if your Honor please, I am not introducing that in evidence at this time, although I have a copy for your Honor's perusal. The reason I am not doing that is because it is in the brief statement of facts. And I just want to ask one question. The brief statement of facts mentioned that Mr. Leuschner, if he took the witness stand, he would testify to the same items. I think there is no opposition to that, as to the validity of those items. But I notice in reading the affidavit I left out one important portion, and that is:

Q. Are those expenditures necessary for the support of yourself and your wife?

A. Yes, we have no other means. [47]

Q. And your family consists of only yourself and your wife?

A. Yes.

Q. You have no employment at this time?

A. No. I am trying to get work appraising, but I have to do a lot of studying at it, and I have little or no income from it at this time.

Q. Now, do you expect your expenditures, the sums necessary for your support, to increase or decrease as time goes on?

A. They will increase by reason of the cancer condition—arthritis condition of my wife.

Q. You say your wife has cancer?

A. Yes. That is, I believe, in the affidavit. And I have a further doctor's statement. That affidavit is about a year old, and I have a further doctor's

(Testimony of Richard D. Leuschner.)

statement I would like to refer to, as to the progress of her condition since that affidavit was signed.

Q. Mr. Leuschner, I don't believe that would be admitted. You can just tell us your wife's condition, why that would have an effect on you.

The Court: Well, maybe counsel will stipulate to this doctor's statement with you that it may be received, although it is hearsay. I don't know whether they will or not. You might ask them.

Mr. DeLew: Will you so stipulate? I don't believe you [48] have seen it, for one thing.

Mr. Dealy: Counsel, I was about to ask what materiality this has to this case.

The Court: Well, it is corroborative of his need for this amount for his support.

Mr. DeLew: Yes, it is just further evidence along that line.

The Court: It's all in the statement.

Mr. Dealy: We will admit the document, your Honor, for what it purports to be, but we do not concede it has any materiality.

The Court: That is to say, you don't raise the question it is hearsay?

Mr. Dealy: We will pass that, your Honor.

The Court: All right.

Mr. DeLew: I will offer it at this time, if your Honor please.

The Court: Let me see it.

Mr. DeLew: Oh, surely.

The Court: The objection as to materiality is

(Testimony of Richard D. Leuschner.)

overruled. The exhibit is received, and give it a number.

The Clerk: Defendants' Exhibit A.

(The affidavit referred to was marked Defendants' Exhibit A in evidence.)

DEFENDANTS' EXHIBIT "A"

Edward A. Jackson, M.D., F.A.C.S.

2630 M Street

Merced, California

February 25, 1957

Honorable Judge United States District Court
San Francisco, California

Gentlemen: RE: Mrs. R. D. Leuschner

For the past year this lady has had severe rheumatoid arthritis of various joints of the body. This is becoming progressively more deforming in spite of using injections of acth and various cortisone products by mouth.

This is now reaching the stage where she has to have help in dressing herself and if this condition continues, it will be necessary for her to have care in a convalescing hospital. The cost at a convalescing hospital is at least \$250.00 a month.

Yours truly,

/s/ Edward A. Jackson, M.D.

EAJ:MC

[Endorsed]: Filed March 7, 1957.

(Testimony of Richard D. Leuschner.)

Mr. DeLew: Now, for the record, if your Honor please, [49] I mentioned this two or three times, but I would like—I don't think it has been stipulated, or anything done about it—I would like to introduce at this time the trust agreement of the Ida Denicke Leuschner trust.

The Court: All right.

Mr. DeLew: Will you all stipulate to that?

Mr. Dealy: I think your Honor has already covered that. It is attached to the complaint in the action.

Mr. DeLew: I am asking that it be brought into evidence.

The Court: All right.

Mr. Dealy: All right, no objection.

The Court: Do you have a copy there, or do you want the copy attached to the complaint to be marked and received?

Mr. DeLew: Well, may we mark and receive that, if your Honor please, because it is a long document.

The Clerk: Defendants' Exhibit B in evidence.

The Court: You offer it, do you?

Mr. DeLew: Yes, your Honor.

The Court: Do you have any objection?

Mr. Dealy: No, your Honor.

The Court: It is received in evidence.

(The trust agreement referred to was marked Defendants' Exhibit B in evidence.)

Q. (By Mr. DeLew): Mr. Leuschner, as one of the co-trustees [50] of this trust, have you had

(Testimony of Richard D. Leuschner.)

occasion from time to time to consult with your other co-trustees, including the First Western Bank or its predecessor, the San Francisco Bank, in connection with the operation of this trust?

A. Yes, ever since 1941, sometimes twice a month, sometimes three or four times a year, just when any business had to be transacted, I traveled to San Francisco and met with Mr. Baker, or later Mr. Hogan or Mr. Anderson, Mr. Hogan's superior, representing the bank, and I had correspondence with my sister, and I believe a year ago I have a confirmation of a general meeting that was held by all the trustees and some of the beneficiaries when some particular point had to be decided.

Mr. DeLew: That's all.

Mr. Dealy: We have no questions, your Honor.

The Court: That will be all.

(Witness excused.)

Mr. Jenks: Your Honor please, as long as we are placing in evidence some of the documents that have been attached to the pleadings, the trust as one of them, I would suggest we place in evidence a photocopy of the notice of levy and photocopy of the final demand.

Mr. Dealy: I believe they are in the stipulated facts.

Mr. Jenks: Are they attached?

Mr. Dealy: Yes. [51]

Mr. Jenks: I didn't realize that.

Then I don't think we need it, your Honor.

The Court: All right.

Mr. DeLew: Shall I go on with my testimony?

The Court: Yes.

Mr. DeLew: I would like at this time, on behalf of Defendant Leuschner, to introduce a number of documents dealing with the bankruptcy matter. If your Honor please, they are all certified copies.

Does counsel wish to look at them?

Mr. Dealy: Yes. We haven't seen them at all.

Mr. DeLew: I was going to wait to the noon recess for that, your Honor, but I thought I would put it in now.

The Court: You imagine we can work this out this afternoon, or will this require more time than that?

Mr. Jenks: As far as I am concerned, my argument will be quite brief and certainly can be summarized in previous statements I have made, your Honor.

Mr. DeLew: I think it can be worked out this afternoon, Judge.

The Court: That would be my objective, to try to reach a decision in this matter by the close of the business day.

Mr. Dealy: Your Honor, as your Honor knows, I have been tied up with another case. I have not had a chance to prepare this matter thoroughly, and I would request decision [52] be withheld until the matter can be briefed on behalf of the government. As late as just last week this matter of the bankruptcy was brought up, and as you know, I have been preparing and trying this other case, and I haven't had the chance to have the research

done for me or do it myself on this question of bankruptcy.

The Court: Well, I won't make any ruling this morning about that one way or the other. Let's see where we get this afternoon, take it up as we go. This may have considerable clarification before we get through with it today.

Mr. Dealy: Now, with regard to these documents, your Honor, we held a two-hour conference—my co-counsel here held a two-hour conference with these counsel last week on this case, and at that time we were not shown these documents, we were not asked to stipulate to their admission, and therefore we object to it, because frankly, one of the documents here is a brief, a trustee's brief. We don't know who the trustee was, and we fail to see what materiality that has with this case, and frankly we do not agree to the introduction of these documents as certified copies. We do not have any way of knowing the authenticity.

Mr. DeLew: They are certified copies, if your Honor please.

The Court: They are records of the proceedings in the Bankruptcy Court, are they? [53]

Mr. DeLew: Yes, all certified copies.

Mr. Dealy: We have never seen the records of the proceedings. We don't know whether they are complete or not.

The Court: I will give you an opportunity to check on them, I suppose, and you can point out anything you wish to.

Mr. Dealy: The records are in the Southern District of California.

Mr. DeLew: I had to get them.

Mr. Dealy: Well, as I pointed out to your Honor, if counsel had brought up this last week we would have had a chance to go to the records and check them.

The Court: How long have you known about this bankruptcy proceeding?

Mr. DeLew: They filed a claim in the bankruptcy proceeding, Judge; filed a claim two years ago.

Mr. Dealy: The department that was maintaining this action did not know about the bankruptcy proceeding, to my knowledge, until Wednesday of last week.

The Court: Who filed a claim in the bankruptcy proceeding two years ago?

Mr. DeLew: It was the District Director of the Internal Revenue, and these gentlemen represented the District Director.

Mr. Dealy: Which district?

Mr. DeLew: This district. Whoever he was—I thought he was up here. [54]

Now, this was filed, Judge, on January 10, 1956.

The Court: I would suppose the Internal Revenue Service file on this matter would contain these records.

Mr. Dealy: No, your Honor, we have the file, or we have been provided with what the service said was the file, and to our knowledge there was no

bankruptcy proceeding, and there was no claim, as far as we know.

The Court: Tell me this: Who was the judge that pretried this matter?

Mr. Jenks: Judge Harris.

The Court: Did Judge Harris, in his pretrial order, make any order about the presentation of documents?

Mr. Dealy: No, your Honor.

The Court: That they would not be received?

Mr. Dealy: No, your Honor.

Mr. DeLew: Some of these I only got this morning.

The Court: Well, it's open to offer them. I don't suppose you could object to them on the ground they weren't shown you before.

Mr. Dealy: We do object on that ground, and on the ground that we weren't asked last week at the stipulation.

Mr. DeLew: Wait a minute. When we sat down for these stipulations counsel came—Mr. Munter came into the stipulation with a prepared set of facts for us to sit down and sign. It took us until five o'clock to change that, because there [55] were so many disagreeable things in there, and it took us until five o'clock, Judge. We had no chance to present our side—nothing on our side.

Mr. Munter: I want to take exception to that.

The Court: Gentlemen—now, gentlemen! One of the things I insist upon is that if counsel has anything to say, that they address their remarks to the Court. I am not going to let you get into

any "Donnybrook" about this, not just yet, at any rate.

Mr. DeLew: Judge, these were all court records.

The Court: Yes, I think I understand what they are. Are you having them marked separately, or together?

Mr. DeLew: I think we can mark them all together.

The Court: Well, I am not so sure about that. Counsel says there is a trustee's brief in there.

Mr. Dealy: Are you going to allow the brief in there, your Honor?

The Court: One of the court records now that you need.

Mr. DeLew: All right.

First of all, if your Honor please, I want to introduce the statement of the bankrupt which shows the claim of the bankrupt here in issue, certified.

The Court: I know, but you said the Referee in Bankruptcy, the judge of the Bankruptcy Court down there, had adjudicated this matter. [56]

Mr. DeLew: Yes, Judge. Just wanted to give you these in order.

The Court: I see. All right.

Mr. DeLew: Then I have the trustee's report of exempt property where he denied the exemption of the spendthrift trust.

The Court: What do you say about this? I don't catch the significance of this. You say the exemption was denied?

Mr. DeLew: Yes, Judge. The reason I put

that in, that is how the matter arose in the Bankruptcy Court. It was after the denial of that.

The the next document I was going to introduce——

The Court: This also recites that this income for spendthrift trust, No. P-109, administered by First Western Bank and Trust Company, San Francisco, approximately \$3,000 per year already held exempt from levy of execution in Schmidt Lithograph against Bear Creek Company.

Mr. DeLew: I don't think that is important, except up above there——

The Court: That is of no significance here.

Mr. DeLew: Up above there where it says——

The Court: The trustee says the exemption asked for the above-named bankrupt in his Bankruptcy Schedule D-5 is denied.

Mr. DeLew: Yes; that creates the issue.

The Court: All right. [57]

Mr. DeLew: But I thought I would present it, and this is the objection to the trustee's report of exempt property.

The Court: Robinson represented whom?

Mr. DeLew: Mr. Leuschner.

Then I have here, if your Honor please, the claim of the United States for the very same taxes that are here in issue.

Now, I have here the trustee's brief on the question of denial of exemption as to spendthrift trust. If counsel objects to that I won't put it in.

Mr. Dealy: We do.

The Court: All right.

Mr. DeLew: All right.

Here are the findings of fact and conclusions of law, and the final order of the Referee in Bankruptcy. I have here the docket entry showing the entry of those findings of fact and judgment and order, and the fact that no appeal was taken from that order, telling us that it was and is a final order in bankruptcy.

The Court: It sustained the objection to the trustee's return of exemptions, and held the trust exempt.

Mr. DeLew: Yes, Judge, as to all claims. And the docket entries indicate, show that there was no appeal taken from that order. I think that's all there is to it.

The Court: They can be all marked together, but we will [58] not receive that brief.

The Clerk: Defendants' Exhibit C in evidence.

(The certified copy of the bankruptcy proceedings referred to was marked Defendants' Exhibit C in evidence.)

Mr. Dealy: The government objects on the ground of lack of foundation. We do not know what these purport to be are what they purport to be, and we have not had an opportunity to consult the file and see how these documents relate to other documents in the file. This is not the whole bankruptcy file.

Mr. DeLew: Only the pertinent part.

The Court: Under the statute if these are properly exemplified, come out of the office down there in the Southern District, how can you oppose them

on the ground that they are not authenticated, counsel?

Mr. Dealy: We have no showing, your Honor, that they are properly identified.

Mr. DeLew: All certified.

The Court: They are all certified.

Mr. DeLew: Right on the face of it.

Mr. Dealy: Stamp and signature, that's all. We have no knowledge of who the officer is that signed it; there is no showing that he was who he purports to be.

The Court: Well, if the basis of your objection is going to be formal, I shall give counsel an opportunity to [59] have them properly exemplified, brought up here. I don't believe we ought to decide this case on merely a formal objection. This is a serious matter; this may be adjudicated down there, you know. If it is adjudicated, I want to give them an opportunity to prove it.

Now, I should think that during the noon recess, Mr. Dealy, I believe that you fellows ought, through the noon hour, to be able to check up on these any way you want to.

Mr. Dealy: We have no way, your Honor. The file is, I take it, in Los Angeles.

Mr. DeLew: The file is in Fresno.

Mr. Dealy: In Fresno.

The Court: You can't tell me that the Internal Revenue Service and the Department of Justice is so lacking in facilities in the State of California that they can't get somebody down there in Fresno,

in the next couple of hours, to go over and verify these facts.

Mr. Jenks: It is a four-hour drive; be about a two-hour 'plane trip.

The Court: I am not talking about that. There must be somebody in the Internal Revenue Service down there in Fresno.

Mr. Dealy: That would assume we have an agent there, that is, that we can contact in two hours, that we can get to go to the Courthouse, or to the court offices, to check the file and call us back. I doubt very much that they have any [60] agent there.

The Court: I won't require you to do it in two hours if you can't do it, but wouldn't you like to make the attempt?

Mr. Dealy: We can call the Director's office here and see if they have an agent there, your Honor, but beyond that——

The Court: How big a town is Fresno?

Mr. Dealy: I haven't the faintest idea.

Mr. DeLew: Seventy-five thousand, probably.

Mr. Munter: If your Honor please, we have a collection office down there, but we have no lawyers in the Department of Justice here, nor in the Internal Revenue Service, and I think it would require a lawyer to examine that file.

The Court: I am not going to require you to do it in two hours.

Mr. Dealy: Normally, your Honor, we would ask a collection officer or an agent, not a lawyer, to

obtain a copy of the file, should we consider we need it for the purposes of this action.

The Court: Well, now, counsel, one time I was in a lawsuit before I went on the bench, and I got in a real hole in that lawsuit. It was in the Federal District Court in Utah before my predecessor up there, who stayed on the bench until he was 92 years old, thereby gave me an opportunity to be a successor. And late in the trial it became evident to everybody that I needed the articles of incorporation of a Delaware [61] corporation, Dover, Delaware. It's a long way from Salt Lake City to Dover, Delaware. And the Federal judge was crotchety about that; he wasn't going to continue the matter at all.

Now, you are not nearly in as bad a hole as that. You're in no hole with me at all; I am going to give you some time, if necessary.

We got those articles out of Dover, Delaware, by telephone and air mail.

Now, I don't see why you can't, by telephone and air mail, or ordinary mail, verify these things, and if you find anything wrong with this, why, let me know about it.

Mr. Dealy: Well, as I see it now, your Honor, the most we can do is call down there and find out if this——

The Court: Are these certified out of the office?

Mr. DeLew: They are all certified, Judge, and Mr. Leuschner was there when they did the certifying. He can take the stand.

The Court: He was there, you say?

Mr. DeLew: Yes.

The Court: Of course, these are photostats.

Mr. DeLew: Yes. There can't be anything wrong with most of those.

The Court: Well, as I understand the statute which concerns the admissibility of public documents, particularly where they are in another Federal District Court in the same [62] State, I should think you would have no objection, properly, to these, Mr. Dealy. Don't you understand the statute that way? I don't want to have any error in this record because we are overlooking something in that statute, but aren't these admissible under the public document statute of the Judicial Code?

Mr. DeLew: Certainly; certified copies.

Mr. Dealy: I would have to consult the statute on that to be absolutely sure, your Honor.

The Court: Suppose you do it during the lunch hour, and we will defer ruling on this until we give you an opportunity to do that. I should think these are admissible in evidence. Unless you can find something to the contrary, they will be received.

We will be at recess until two o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m.) [63]

March 7, 1957—2:00 O'Clock P.M.

The Court: All right, gentlemen.

Mr. Dealy: Your Honor, we are resuming with regard to these documents.

The United States will at this time interpose no

objection to their introduction if the Court will permit us at a later time to obtain the record and examine it to see if there are other documents which we desire to put in.

The Court: Yes, of course.

They will be received with the understanding that the government may check them and call the Court's attention to anything that may be wrong, if there be anything wrong, which, of course, I have no notion there is.

Mr. DeLew: Thank you.

The Clerk: Defendants' Exhibit C in evidence.

The Court: Those are the bankruptcy proceedings. What are the numbers?

The Clerk: They are all in as one exhibit—C.

The Court: That's right, Exhibit C. Thank you. All right.

Now, is there any other evidence you want in the record before we proceed with the argument?

Mr. Jenks: As far as I know, your Honor, we are ready to proceed. Reserve any question regarding evidence on [64] attorneys' fees.

The Court: Oh, yes.

All right, you may proceed, gentlemen. Mr. Dealy?

Mr. Dealy: As your Honor knows from our opening statements this morning, I feel that you are familiar with the facts, so we won't belabor those at this time.

These taxes were assessed on the dates stipulated.

The Court: Well, there isn't any point in talking about that. Now, let's get right down to the

nub of this matter, and that is whether or not you have got a valid levy.

Mr. Dealy: Your Honor, the levy was served on the bank as the custodian of the funds. The bank in its pleadings, in the cross-complaint which they have filed, and in their answer to the complaint in the case of Leuschner versus the First Western Bank, the bank states, or has an allegation in its own complaint, and admits in the answer to the complaint, that a notice of levy was filed by the United States upon it. It states that, and it states that as its reason for being unable to distribute the funds or make payment out of the funds. And we feel that inasmuch as the levy was made in the normal course of business, it was made by the proper officer, it was made on a trust officer of the bank which held the property as custodian of the funds and as one of the co-trustees, as the co-trustee with actual custody of the property.

Now, under the law the levy is served on the individual [65] who has the property in its custody. That's what we have done here. We feel inasmuch as they have admitted that they received the notice of the levy and, I believe, the final demand, and the testimony of Mr. Hogan confirms that, that the matter is—of whether or not they had received it—is really not in issue, and that it was valid and in accord with the law, and that the United States, as to the action against the bank, is entitled to that penalty.

Now, even if the levy were said to be invalid by the Court as to the action against the bank, we

have valid liens on Richard D. Leuschner's property and all rights to property, and we are entitled in the other action to foreclose those liens against this property.

As your Honor is no doubt aware, these assessments were made and the liens arose under the section of the 1939 Code, Section 3670, which sets out the property which is subject to the lien. 3671 describe the period. This lien has not been released. This lien has been filed of record, and the court decisions hold that the tax lien is broad and comprehensive and covers all property possessed by the taxpayer to the extent of his interest in and any rights thereto. The decision on that is Metropolitan Life Insurance Company versus the United States, 107 Federal (2d), 311.

The Court: Well, now, what are the facts in that case?

Mr. Dealy: That case, your Honor, involved an insurance [66] levy on an insurance policy.

The Court: Is that a case where there was a spendthrift trust provision?

Mr. Dealy: No, your Honor, but I believe I can show——

The Court: Is that a case where the Referee in Bankruptcy had adjudicated the proceedings to which the government was a party, a creditor, that the assets were exempt?

Mr. Dealy: Your Honor, I believe I can show you right now on the spendthrift trust provision where the California law on spendthrift trust has no validity in this action whatsoever.

The Court: I would like to see that.

Mr. Dealy: All right, your Honor. It is a matter of Hornbrook law, as far as tax law is concerned, and the United States Supreme Court has so said, that tax litigation, tax law, is a matter of federal law, and that the state exemption statute which this spendthrift trust statute is,—

The Court: Oh, no, no. Is this spendthrift trust provision written into the trust instrument, or are you relying upon the statute?

Mr. DeLew: Written into the instrument, if your Honor please.

The Court: That isn't an exemption statute.

Mr. Dealy: Your Honor, a provision of an instrument of [67] this nature cannot exempt something from Federal taxation when the courts have all held, including this circuit, the Ninth Circuit and Tenth Circuit,—

The Court: Just show me a case.

Mr. Dealy: All right, your Honor.

The Court: I am kind of a case-reader. If you have a case that decides this one, why, let me read it.

Mr. Dealy: This appears—I will read this right out of the—

The Court: Let me see—let me read the opinion in the case that you think—

Mr. Dealy: Your Honor, I will have to get the opinions, because I didn't bring the opinions to court with me. I have the citations here, but I don't have the texts.

The Court: I always like to read them right

here. If you need one, why, send your associate up to the library.

Mr. Dealy: All right, I will have to go out and get him.

The Court: You don't need to get me a whole armful; bring me one that supports your position, either in the Ninth Circuit or in the Supreme Court of the United States. You mentioned both of those, Mr. Dealy. Let me have either one or both of them. We can stop the argument in a hurry if you have a case on that subject in this circuit.

Mr. Dealy: Your Honor, here is *United States versus Heffron*, in the Circuit Court of Appeals for the Ninth Circuit, [68] which states:

"Exemptions provided by State laws are ineffective against statutory liens of the United States."

The Court: Of course, that isn't this case. That's why I want to see these cases. I learned a long time ago the way to find out what a case decides is to get your eye on it.

Mr. Dealy: Your Honor, if I understand the argument of the plaintiffs, or the other parties in this case, they are relying on State statutes of this State which says you cannot exempt, that you cannot levy, or—yes, you cannot levy on a trust that has a provision in it of this nature. Now, what that simply means——

The Court: No. As I understand the argument in this case, it is founded upon the law of spendthrift trusts. Now, the law of spendthrift trusts, generally speaking, in this country, is that if a trust instrument contains a spendthrift trust provision

of a sort which I will describe in a minute, creditors of the beneficiary may neither reach the income nor the principal by way of anticipation. That is to say, it can't be reached by creditors until the installment, or whatever it is, is in the hands, paid into the hands of the beneficiary.

Now, that provision normally, in its widest scope, is that neither the principal nor the income payments can be [69] reached by creditors by way of anticipation of their payment.

Now, that's what they are relying upon.

There is some authority in the country with which I am familiar that a man, a beneficiary of such a trust, may not stand upon it to defeat his divorced wife's claim for support for herself and her children. As a matter of policy the courts have said that is the type of claim that isn't foreclosed by a spendthrift trust provision.

Now, I have been wondering, as I listened to you this morning, whether there is any authority that a Federal tax claim——

Mr. Dealy: We have that authority, your Honor.

The Court: Well, that's what I would like to get my eye on.

There is a line of authority with respect to alimony and support money—that is to say, this fellow can't sit over in the Union Club, you know, in a heavily upholstered leather chair with his feet on the window sill, basking in the glory of his opulence, while his wife and kids are starving out here and he has no other means out of which they can secure support money. Of course, the courts just

don't allow that. I think Justice Cardozo, when he was on the Court of Appeals, decided a case along that line.

Now, I don't know whether a Federal tax claim falls into a similar exemption from the application of a spendthrift trust [70] provisions, you see.

Do you gentlemen have any law on that? Now, there are some lines of cases with which I am generally familiar that are exempted from the application; the beneficiary is just not protected by a spendthrift provision in certain kinds of cases, and one is a divorce situation, support money, alimony and support money. A fellow can't be over there drawing \$1,200.00 a day, living in opulence, and stand on the spendthrift trust provision to prevent his former wife and half a dozen youngsters from having the necessities of life, bread in their mouths.

Now, I don't know. I have sort of a notion that maybe a Federal tax claim fell into one of those exceptional situations, and if it does, why, we can decide that one pretty fast. I would like to have Ninth Circuit decisions or a decision of the Supreme Court of the United States on this subject.

Mr. Dealy: Well, your Honor, our position on this whole thing is that this provision in the trust, in the agreement, is supported by a provision of the California statute.

The Court: Well, I don't understand that.

Mr. Troxel: May I make this suggestion to the Court, counsel? The California statute which was cited to the Court this morning is not an exemption statute; it is merely a codification of Justice Cor-

dozo's rule that a man is entitled only to his reasonable support from the spendthrift trust and [71] that the rest of it may be attached and taken by his creditors. It is not an exemption statute. Actually it is a derivation of the old spendthrift trust rule that the beneficiary should have it all and merely states that all that over and above that which is necessary for reasonable support may be taken by his creditors.

The Court: Now, I think that the exemption is founded upon the terms of the gift, I would say the creator of this trust, a gift to a beneficiary of a beneficial interest and puts some restrictions upon it. The California statute, it sounds to me, as though it is a limitation upon the creator's power to create the spendthrift trust in an unlimited sort of way.

Mr. Dealy: Your Honor, would you desire to adjourn this while I see where our authority is coming to?

The Court: No, while we are waiting for those, maybe we can talk about another one.

Another thing that bothers me is why isn't the Government bound by the adjudication of the bankruptcy court in this matter?

Mr. Dealy: Your Honor, the bankruptcy court acts under—I read that shortly before court convened, and as I read that, the bankruptcy court decided that Trust P-109 is a spendthrift trust and that the interest of the beneficiary bankrupt, Richard D. Leuschner, has in the trust is exempt from any claims of creditors. [72]

The Court: Yes.

Mr. Dealy: And of course all the referee could be deciding is in bankruptcy; he couldn't be deciding free from the claim of creditors in other proceedings.

The Court: Well, the trouble is the United States presented a claim.

Mr. Dealy: But the claim was not disallowed, your Honor, and the fact is that—in other words, the tax liability is still outstanding. The claim was not disallowed. In other words, the tax liability wasn't litigated in the bankruptcy proceedings.

The Court: What the trustee refused to do was to sequester this property and apply it to the payment of the claims that had been filed.

Mr. Dealy: That is correct, your Honor. Now, under Section 6 of the Bankruptcy Act, which is Section 24 of the United States Code, Title 11, it states exemptions of bankrupts, and that states as follows:

“This title shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for six months immediately preceding the filing of the petition * * *” and it goes on. But the important point here [73] is that the Bankruptcy Act specifically recognizes the exemption provided by state law, and it is our contention that the California law exempts spendthrift trusts, the bene-

ficiary's interest in a spendthrift trust, which the bankruptcy court recognized.

The Court: I don't think there is an exemption by statute at all.

Mr. Dealy: I don't believe, your Honor, I don't mean by statute, I mean either by common law or by statute. If the state law exempts it in any way, then the bankruptcy court is recognized, is granted the power by Congress to recognize that. But there is no such recognition granted in the Internal Revenue Code.

The Court: The bankruptcy court doesn't have to look for any exemptions by law, all the bankruptcy court has to do in a spendthrift trust provision is to see what limitations upon the levy the creator has written into that trust.

Mr. Dealy: Well, your Honor, our view of this case is that the bankruptcy court was empowered by the provisions of the Bankruptcy Act to act in that action with regard to a spendthrift trust as recognized by California law, and our view is that the Federal law states from the Supreme Court on down, including this Circuit, that exemptions provided by state law are not valid as to tax liens of the United States and that we are therefore justified and entirely entitled to [74] exercise the foreclosure of our tax lien against this interest.

The Court: I want to see whether or not those decisions go to a situation covered by a spendthrift trust provision and a trust document.

Mr. Troxel: If the Court please, I don't want to usurp the argument of counsel, but coming from

the office that prepared the trust indenture for the trustor, I feel a certain responsibility to uphold the validity of the spendthrift trust.

This is a document by which the interest, if any, of the taxpayer, Mr. Leuschner, is defined, and the interest created in him is created entirely by this contract. Anything that goes contrary to setting the contract aside is an abrogation of contract rights and contract likewise defining the amount of property also defined what any creditor, even the United States, if it does have a lien, establishes.

The Court: Well, that is to say the United States nor any other creditor can get more than the beneficiary of this trust had by virtue of the gift.

Mr. Troxel: That is correct, and since the cases have been decided under the provisions of Section 859 allowing creditors the surplus rights, a good many of the practitioners in California have gone one step further and specifically to provide in cases of divorced people or other creditors that the trustee shall pay to the beneficiary (A) only so much money as is reasonably necessary for his actual support, and that [75] the trustee will then pay the balance over to B, C, D, and E, which is a recognition of the fact you are creating only a certain limited interest in the beneficiary. [75-A]

We feel, as creators of the instrument here, that a valid limited interest is created which is subject to lien or taxes or anything else, and that it is not an exemption statute, it is not a law of exemption, it is a law of creation.

Mr. Dealy: Your Honor, here we have a decision

from the Court of Appeals in New York involving a spendthrift trust——

The Court: No, no.

Mr. Dealy: Your Honor, this is a case where certiorari was denied by the Supreme Court of the United States.

The Court: Where certiorari is denied, it doesn't mean a thing on the merits, Mr. Dealy, not a thing. The Supreme Court of the United States in the last year or two has half a dozen times been at great pains to say that all certiorari denied means certiorari is denied. It doesn't mean a thing on the merits.

Mr. Dealy: Your Honor, we have the United States vs. Canfield, Southern District of California, in this circuit, a case on this point, and my colleague didn't bring it down with him.

The Court: Well, all I have got to say to you, counsel, is that I am here for the purpose of hearing you on this point, and you better get your cases here, because I am going to decide this matter pretty soon and I would like to decide it on the basis of the authorities. But I am not going to have somebody summarize what they think a case held; I want to get [76] my eye on it. If you have any authorities, you better get them here.

Mr. Dealy: Until he comes, I guess I have nothing further to say.

The Court: Well, let's go over to the bank's side of the case. Now, counsel for the bank told me this morning—now wait, I want to talk to you about this, Mr. Dealy—the counsel for the bank

told me this morning that there was a controversy going on when that notice of levy——

Mr. Jenks: When the final demand was received.

The Court: When the final demand was made, there was a controversy going on because of the notice being served. That's No. 1. And before paying the money out, they are entitled to have that controversy settled. And moreover, the bank takes the position that they are only one of three trustees, that the ownership of this trust rests in the three of them and one couldn't properly respond to that notice and final demand, which had not been served upon the others.

Now, what do you say about that? This is the bank's argument. Of course, if we decide this thing the other way, I mean, on the point we were just discussing and that's why I wanted to discuss those first, you don't have to worry about the bank's position, but if this is a valid levy, valid liens to foreclose here, then we will have to examine these points, and while we are waiting for your authorities, we might as [77] well hear what your position is on that, Mr. Dealy.

Mr. Dealy: Well, as far as the position of the United States is on that, at the time the levy was made there was no controversy whatsoever, so the demand or the levy was made to pay over at that time. The bank didn't pay over. We made the levy on a trust officer of the bank, the bank has admitted that they received the levy from the trust officer.

The Court: Well, what do you say to the prop-

osition that in this very trust instrument, which the bank has a copy of, and as a matter of fact the bank is holding the trust under that instrument, in that instrument there is a spendthrift trust provision.

Now, the United States sends down a levy for a tax claim. The bank has presented right here and now a very serious question; it is the very question we are trying to settle in court this afternoon, namely, whether the United States can reach the beneficiary's interest in view of that provision.

Now, I think it would be very foolhardy, don't you, in view of that provision for the bank to turn the money over to the United States? Who is entitled to that money? Maybe the United States is; maybe the United States isn't. Now, do you think this court ought to impose a penalty upon the bank in view of these circumstances; (a) there is a spendthrift trust provision in this trust; (b) it's the United States claiming the full interest of the beneficiary under the trust, [78] principal and interest—principal and income, as a matter of fact; and (c) there are three trustees and some subordinate bank officer is the only one who has received any service about the thing. The other two trustees haven't been contacted at all, and there is a question about whether there is proper service upon the bank as trustee.

Mr. Dealy: I believe, your Honor, that they admitted here that the trustees were all contacted within a matter of hours or a couple of days and they had all——

The Court: Well, you're making a levy, now. You have got to do more than contact them.

Mr. Jenks: I might add a fourth point, your Honor, that there was nothing payable to the taxpayer the day the notice was received.

The Court: Yes. The fellow isn't entitled to receive his payment until the end of the month.

Mr. Dealy: Your Honor, we were actually seizing the right from that day on.

The Court: Yes, I know.

Mr. Dealy: All the other payments.

Mr. Jenks: The difficulty with that arrangement, Mr. Dealy, is your final demand does not ask for that. Your final demand merely asks for the amount of money owed on the date of the levy.

The further difficulty with that argument is, as I [79] pointed out this morning, the penalty statutes must be strictly construed, and it allows interest at six per cent from the date of the levy. Now, you can't allow interest at six per cent on sums that were not then payable. Therefore, under the penalty statute you must be referring only to amounts due on the date of the levy, and there were none.

Mr. Dealy: We contend that the six per cent, your Honor, runs from the date that the payments should have been made, whatever that might be.

Mr. Jenks: That is not what the statute says, your Honor, and it must be strictly construed.

Mr. Dealy: The lien, your Honor, applies to all property, rights to property, intangibles, everything else of Mr. Richard Leuschner.

Mr. Jenks: May I point this out, this is the first time the lien has been mentioned. I am perfectly willing to admit, your Honor, that whether this was a valid or invalid levy, when the bank received the notice, that gave the bank actual notice of the lien at that time. At that time we were not going to pay Leuschner, but merely because we had actual notice of the lien and therefore under the regulations, which exempt banks until they get actual notice, are not going to pay, does not mean that having received actual notice of the lien that we are under a duty to pay the Government and subject to a penalty if we fail to do it. As long as this lien is [80] in existence, whether it is foreclosure or not, we are not going to pay Mr. Leuschner because we have actual notice of it.

The Court: Of course, and you have a defense to his claim, but if you paid the Government and then the matter is litigated, if there is an issue being litigated, it would have been an improper payment and then you are liable to Mr. Richard Leuschner.

Mr. Jenks: You must remember Mr. Leuschner himself filed the first suit, the first information that they wanted to foreclose the lien.

The Court: Yes, Mr. Leuschner filed the suit against the bank.

Mr. Jenks: Against the bank and then we interpleaded the Government and that's the suit in which they want to foreclose the lien.

The Court: Now, to come back to my question, Mr. Dealy: In these circumstances, having regard

to, oh, four or five propositions that we have had presented by counsel, do you think a bank is subject to a penalty if it acts as it has acted in those circumstances?

Mr. Dealy: We contend, your Honor, that there is only one defense to that 3710 penalty: non-possession at the time of anything, and here they had possession of the trust, the rights of Mr. Leuschner.

The Court: I tell you what you are going to have to do [81] to get my concurrence in that view, you will have to show me some authority that is not just persuasive, you will have to show me some authority that obliges me to hold that way.

Mr. Dealy: Your Honor, it is because of this, as you know, I have not been able to research this problem that I wanted to file a brief in this case.

The Court: Mr. Dealy, I am in the habit of having counsel present a dozen cases to me during the trial term and I expect them to be ready in all of them. The United States Attorneys are expected to be prepared for the trial term in any case that comes on in the trial term.

Mr. Dealy: This is the case in United States vs. Canfield, your Honor, in the Southern District of California, which relates to spendthrift trusts.

The Court: Now, what do you say this holds?

Mr. Dealy: We say that that holds that the right of spendthrift trusts can be reached by the United States, the right of the beneficiary in the trust can be reached by the United States.

The Court: This is a Southern District case.

Mr. Dealy: That's right.

The Court: Now, did this go to the Circuit?

Mr. Dealy: To my knowledge it did not.

The Court: Well, let's see. This is Judge—Southern District of California and Judge McCormick. Have you folks [82] seen this?

Mr. DeLew: Yes, sir, Judge.

The Court: What do you say about it?

Mr. DeLew: Well, as far as the Canfield case is concerned, if your Honor please, I don't think it strikes this situation at all, for this very reason: that Canfield did not appear in the case, he didn't appear in the case to present his defenses, from what the case seems to indicate, at least. I have read it very thoroughly and I cannot find that he appeared there at all.

Number two, and perhaps more important, it does not in any place, in that Canfield case, bring out the proposition of Civil Code Section 859. In other words, the point wasn't even raised in that case with respect to the amounts necessary under this limitation of the trustor's power to create this limitation for the necessities of life that Leuschner is claiming here. It doesn't raise that issue at all.

The Court: Let me read this and see what it is about.

Mr. DeLew: Yes, your Honor.

The Court: Mr. Dealy, listen to this. The Court says on page 735, the second column, a little below the middle of the page:

“There is also respectable authority to the effect that issues of the legality of the assessments or the collection of the taxes of Canfield cannot be raised

by [83] the defendant bank, as it is not the taxpayer."

But here we have the taxpayer raising that question.

Mr. Dealy: To my knowledge the taxpayer hasn't raised the legality of the assessments here in this action.

The Court: That's what this whole claim is about.

Mr. Dealy: No, your Honor, to my knowledge the taxpayer admits the tax.

Mr. DeLew: We don't admit——

The Court: Legality of the assessment or collection, the enforcement of the assessment, that's covered by this language.

So far as the bank is concerned in the Canfield case, there is another distinguishing circumstance, and that is since 1927 the defendant trustee has yearly allocated and paid from the income of the trust estate of Canfield sums of money ranging from approximately \$51,000.00 in 1927 to more than \$35,000.00 in 1932. In other words, the bank paid out these moneys in spite of the levy, and in this case, the case before us, the bank is holding it. If you are talking about the bank's liability, that is a very different situation, it seems to me.

I don't see any place in this case where it says this is a spendthrift trust; was it in the Canfield case or not?

Mr. Dealy: Yes, your Honor, it was.

The Court: I don't find them saying so. [84]

Mr. Jenks: As I recall it, your Honor, this trust

had previously been the subject of a state court decision where a sister and creditor of this Mr. Canfield had sued and in the state court case, as a matter of case law in California, it was decided that creditors could reach the excess over and above what the beneficiary needed for his estate.

The Court: I see.

Mr. Jenks: In fact, as I recall it, the court decided Mr. Canfield was entitled to \$20,000.00 a year and the creditors were entitled to the excess.

The Court: I see. In other words, the statute referred to this morning was applied?

Mr. DeLew: Yes, the statute may have been codified, the decision in the case, I forget which came first.

The Court: I see.

Mr. Dealy: I believe it says it is a spendthrift trust on page 736, your Honor, the first paragraph, second column, on the second column.

The Court: The first full paragraph?

Mr. Dealy: The first full paragraph, starting with "We also find."

The Court: I have it now. Yes, I see it. Well, this is a very narrow point of time, it seems to me. This is a very interesting thing.

"In ascertaining the legal attendants to the [85] investiture of the property and rights to property of Canfield by the allocation of trust income to him, it should be noted that before giving money to Canfield, the trustee must necessarily decide to give it to him, and that during appreciable time, however brief, the allocation and award must precede

the delivery of the income Canfield is to receive, and during that time the lien of the sovereign taxing power attaches.”

That isn't what the spendthrift provision says; it says that the creditors can't reach it until it's paid into the beneficiary's hands, that's the usual provision.

Mr. Jenks: This even goes a little further, your Honor, and states that the trustees are entitled to the personal receipt of the beneficiary.

Mr. DeLew: If your Honor please——

The Court: Wait a minute, I am not through with it.

Well, as far as the bank's liability is concerned here, this case is distinguishable in view of this sentence:

“The true factual situation as we have found it from the evidence shows wilful falsification of existing material facts which misled the United States and which vitiates the alleged compromise averred in the pleadings in this action.”

Now, my goodness, there's no wilful falsification in this case.

Mr. Dealy: No, your Honor. [86]

The Court: Well, I don't believe that the case reaches us.

Now, you said something about having a United States Supreme Court case which holds that spendthrift trusts provision does not avail against the United States tax lien or claim.

Mr. Dealy: That was the Rosenberg case which

your Honor said you did not wish to consider, on which certiorari was denied.

The Court: You mean you had, you claimed you had a United States Supreme Court decision because——

Mr. Dealy: No, your Honor.

The Court: ——certiorari had been denied?

Mr. Dealy: No, that kind of a case——

The Court: Well, now, what do you mean, where is that case then? You said you had a case in which the Supreme Court of the United States held, as you told me.

Mr. Dealy: Your Honor, I didn't say that. My statement, as I believe it was, was that the Supreme Court of the United States has held that the exemption statutes of state law do not prohibit the United States from getting at the so-called exempt property for taxes. We have that in the case of——

The Court: No, I told you about Justice Cardoza's notion that the beneficiary of a spendthrift trust ought not to be able to live in opulence and prevent his divorced wife [87] and children from any livelihood out of that spendthrift trust estate, and I said that I have been thinking this morning that maybe there is a similar line of authority applicable to tax claims of the United States against such estates, and you said there was, and you said there was a Supreme Court decision.

Mr. Dealy: I believe, your Honor, I meant the Rosenberg case in which certiorari was denied. That to me—I am sorry if your Honor does not interpret it the same way, but to me that is the

same as having the Supreme Court make a decision on that point.

The Court: Mr. Dealy, it isn't a question of my feeling about it at all. The Supreme Court of the United States has said a dozen times in the last two years, they spelled that out, the various justices have filed memoranda where cert. is denied and Frankfurter, at great length said so. As a matter of fact, in the decision of Brom against the United States which involves petition for habeas corpus in a federal court by an inmate of a state penitentiary under a conviction and under sentence of death in a murder case. There are several associated cases there. In the Brom case Justice Frankfurter went to great pains to spell that out and impatiently spelled it out because it had enough of the subject, that when the court denies cert. they are settling some proposition of law on the merits and they denied it. The whole [88] court said so, and repeatedly.

Now, you talk about Hornbrook law, there isn't anything more plainly settled in the decisions of the Supreme Court of the United States than when you say that cert. denied holds something, or it holds, if you want to take the language of the court for it, is that cert. is denied.

Mr. Dealy: Your Honor, I have no Supreme Court case on the specific point of a spendthrift trust. The best I can do is Rosenberg.

The Court: You mentioned a Ninth Circuit case.

Mr. Dealy: All the cases I have, your Honor, Supreme Court, Ninth Circuit and Tenth Circuit,

all deal with the fact that a state exemption statute does not exempt from income taxes. That is the statement I thought I made.

The Court: Well, go ahead with your argument; now you have your authorities, I assume.

Mr. Dealy: Your Honor, I believe we have covered in various discussions here now the argument I had intended to make. I intended to stand on the line of decisions that says, from the Rosenberg will case on down, which is cited in the memorandum in the file, that spendthrift trust provisions are not exempt from income tax and that we can reach them to enforce our lien. And one of those decisions was the Canfield case. I believe I have decisions here, if your Honor desires to read them. [89]

The Court: The only trouble with the Canfield case is that under your California statute a man is entitled to have enough to support himself, protected by the spendthrift trust provision.

Now, he has testified here as to how much that is. Now, Canfield doesn't deprive him of that. You don't disagree, do you?

Mr. Dealy: I believe the Canfield decision, that decision states we can get to everything. I suppose in the state court the creditors can get to the extra.

Mr. Jenks: The state court said "excess".

Mr. Dealy: The state court said the excess. That decision stands.

The Court: Well, in view of the statute this decision is superceded.

Mr. Dealy: And, your Honor, I have decisions

which state that state exemption statutes, which we contend this state provision is an exemption statute, are not to stand in face of income tax litigation.

The Court: Let me see your best case on that.

Mr. Dealy: All right, your Honor.

Mr. Troxel: If your Honor please, I don't like to interrupt a point, but this is not an exemption statute.

The Court: I understand, but I just want to get my eye on a case and see what they are talking about. I understand [90] that. This is a spendthrift trust provision.

Mr. Dealy: Start off with a Ninth Circuit decision, your Honor.

The Court: You mean Hefron?

Mr. Dealy: Yes, your Honor.

The Court: Well, now, the Hefron case is talking about a homestead.

Mr. Dealy: That is correct, your Honor.

The Court: Yes. It is talking about a homestead which was selected by the owners of the property.

Mr. Dealy: That's right.

The Court: It isn't a situation where they acquire a limited interest in the property; they had all the interest in the property and chose the protection of the Homestead Law for this particular part of it.

Now, you say you have a Tenth Circuit case? What kind of a lien was it in that one?

Mr. Dealy: Federal income tax, your Honor.

The Court: I mean what kind of a state exemption. This is a homestead.

Mr. Dealy: I believe it is also another homestead.

The Court: Yes, I see it is. Now, what else have you?

Mr. Dealy: Well, I only have in this particular instance——

The Court: Have you a case now that holds that the [91] spendthrift provision is unavailable against a Federal tax claim, lien or otherwise? Have you got a case like that?

Mr. Dealy: We believe that is what the Rosenberg case in New York stands for. That is our best case on the point.

The Court: That's the Court of Appeals in New York.

Mr. Dealy: That's right.

The Court: You don't have any Federal cases?

Mr. Dealy: No, other than this Canfield case.

The Court: Well, I don't think Canfield reaches us. I don't think Canfield reaches us because California now says in the Code that he is protected up to the amount of support which he needs and the record is closed on that and the testimony is that he needs, what was it, \$750.00?

Mr. Delew: \$750.00, your Honor.

The Court: A month, which, in these days, it seems to me, is a modest enough sum for himself and his wife. His wife is ill, with prospects of being worse. Let me see that Rosenberg case you had here.

Mr. Dealy: Here are two decisions, the Rosenberg case and a Fifth Circuit decision.

The Court: Let me see the Rosenberg case. You say that is the best one you have?

Mr. Dealy: I believe that is our best situation.

The Court: That's a divided court; the Chief Justice and one other justice dissented. [92]

Does anybody have around here in one of the libraries in this building Scott's Treatise on Trusts, three or four-volume treatise on trusts? Do you know anything about that?

Mr. Dealy: I wouldn't know, your Honor.

The Court: Don't you have a central library?

Mr. DeLew: Just the Circuit Court Library, your Honor, on this floor.

The Court: If that's the case, I wonder if you would be good enough—I will give you a note to the librarian—to bring it in?

As a matter of fact, have you gentlemen examined the American Law Institute Restatement on Trusts on this subject?

Mr. DeLew: Yes, your Honor.

The Court: What did they say about it?

Mr. DeLew: This particular point, I don't think, is covered, as far as I recall.

The Court: I would be surprised if it didn't say something on that subject, in the notes or somewhere in there.

Mr. Jenks: I might say that as far as the bank is concerned, your Honor, we felt that this was a problem primarily for the taxpayer and we have not attempted to complete research. However, I know of no cases other than the Rosenberg case that could be construed as applying and I agree

with counsel that because of California law you may have an entirely different result involved in this matter. [93]

Mr. DeLew: Rosenberg, I don't believe, is in point here at all.

Mr. Dealy: I believe, your Honor, this case may be closer than any of the others, in the Maryland District Court, which discusses the Rosenberg case at length and applies it, notes the contrast, as I think we may have here.

The Court: New York has a statute like the California statute?

Mr. DeLew: If your Honor please, I think the statute involved in that case was strictly an exemption statute, a 10% and 90% type of thing where an arbitrary 10% went off to the creditors. I don't think that is the same type of thing. Now, I checked the Civil Practices Act of New York and I can tell your Honor it is an exempt statute, the Civil Practices Act in New York. I checked it.

The Court: Let's just see now what he says about spendthrift trusts. This is a Bible on the subject. The section is 157.4. Claims of the Government.

The section of the restatement is paragraph 157. This is 157.4, page 1121 of Volume 2, Scott on Trusts, second edition.

"In the Restatement of Trusts, paragraph 157, as originally adopted, there was no statement as to claims by the United States or a state against the beneficiary of a spendthrift trust. By an amendment adopted in [94] 1947, however, it was pro-

vided that 'Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary * * * by the United States or a state or subdivision thereof to satisfy a claim against the beneficiary.'

"Claims for taxes. It has been held in a number of cases that the Government can reach the interest of a beneficiary of a spendthrift trust to enforce its claim for unpaid taxes."

And he cites *United States vs. Dallas National Bank* in 152 Fed. 2d 582 in the Fifth Circuit, that is 1946, reversing 56 F. Sup. 701 in the Northern District of Texas, *Mercantile Trust Company vs. Hofferbert*, 58 Fed. Sup. 701, the District Court of Maryland in 1944, *United States vs. Mercantile Trust Company*, 62 Fed. Sup. 837 in 1945 in Maryland, in the Matter of Rosenberg, 269 N.Y. 247 in 1935.

"Thus in matter of Rosenberg it was held that the United States was entitled to a decree that the income to become due to the life beneficiary of a trust should be paid to it until its claim against the beneficiary for unpaid income taxes should be satisfied. Under the New York statutes ordinary creditors were entitled only to so much of the income as is not needed for the support of the beneficiary and to 10% of the income which is [95] payable to him. The Court held that these restrictions on the power of creditors to reach the interest of the beneficiary are not applicable to the Federal Government. The Federal statutes give the Government a lien upon

all property of the taxpayer for unpaid Federal income taxes, * * *''

You don't need to take this, Mr. Reporter.

(Court continuing to read.)

Mr. DeLew: If your Honor please, I am familiar with those pages that were referred to there, I have read them all forward and backwards and in not one have they got a statute like they have in California for the support. In not one.

The Court: Well, you're getting pretty close to Rosenberg.

Mr. DeLew: Yes, Judge, that's the strongest case the Government has got, they are getting close to it, but I will say, and I think the Court will recognize, that that was strictly an exemption statute. Now, a man could have been a millionaire and not needed any support and yet had his ten per cent only given to his creditors. Here we have a different situation. The law of this state says if a man is a millionaire he is not entitled to nothing, and the spendthrift trust goes out the window.

The Court: Let me put a question to you, counsel.

Mr. DeLew: Yes. [96]

The Court: Suppose it becomes established law in this country that the interest of the beneficiary of a spendthrift trust may not be reached for payment of income tax claims of the United States Government. Now, suppose in all the testamentary trusts of wealthy men in the nation from now on counsel writes that kind of a provision into it, the testamentary trust, or into a survivor's trust, for

that matter, or both, and of course the push will be in the direction by wills draftsmen and trusts draftsmen of doing just that. [97] Do you think that's proper law to establish that sons and daughters of the owners of the nation's wealth may have their income and principal removed from taxation simply because the old man had good tax counsel, when the instruments were drawn who wrote into the documents the spendthrift trust provisions?

Mr. DeLew: No, Judge.

The Court: No, of course you don't.

Mr. DeLew: Nobody is going to say that. But Judge, this is different, and it's our position and I think you recognize it, it's not simply the idea of a spendthrift trust. I would be the last man to say it, I am a taxpayer myself and a citizen and I hope to be a good citizen of this country, as all of us are, but when it come down to a man's support, when he is at the end of the line, when the State of California says these things, that's a little different, Judge. The sons and daughters aren't going to go broke, they are not going to go into bankruptcy to defeat the United States. I wish, like you do, that I had more income taxes to pay. He wishes he could pay taxes too, but now he is at the end of the line and all we are asking for here is support. He becomes a public charge, he has been through bankruptcy.

The Court: In posing that question to you I hope you didn't understand me as casting any aspersions upon folks in this lawsuit. [98]

Mr. DeLew: Of course not.

The Court: Or upon Counsel or the bank. I had no such thing in mind at all, but it just occurs to me, after reading Scott here, that's Scott's thinking.

Mr. DeLew: Yes, that's Scott's thinking in a brand of claim that we don't have here.

The Court: Scott's just writing in textbooks; we are going to make some law.

Mr. DeLew: Yes, Judge, but I think the best law can be written by keeping people off the charity rolls. Consider, Judge, this: consider the state of facts that we have. We have a tax claim in excess of \$200,000. Counsel figured out for us this morning the interest on that tax claim exceeds the income of this trust, the amount of receipts from that trust. The man gets a job. The collector throws a distraint on his employer. What's he going to do from here on out. If that man owes me \$200,000, or any sum, he can go through bankruptcy, clean the slate. That was the idea of our forefathers in founding this country, give him a chance. No, the Government says, we will give you no chance, and it's our Government.

That's not right, Judge. But it can be softened, it can be softened by at least letting him have his support money. There is nothing he can do to get rid of this tax claim. Absolutely nothing. He will never earn that much. He is fifty three years of age. How can he ever make it? It can't be done. [99]

I think the best law in this case is made by upholding the statute, the solemn statute of the State

of California. I honestly think so, Judge, with respect to this trust.

Now, perhaps your Honor does not wish me to go into the other points at this time.

The Court: Yes, please do.

Mr. Delew: All right. The other points that we mentioned this morning, first of all, is the attempted levy. There we have the fact that a certain notice of levy was served upon an employee of the bank, the trust department of the bank. The notice of levy was directed to the trust officer. The notice of levy itself is not a levy at all. I mentioned earlier today that it was struck down in another case, the case of the United States against O'Dell. It is reported in 160 Federal 304, and I am referring now to page 307.

In that case, Judge, there had been a stipulation entered into between the Counsel, much as we have done here, and in the stipulation, instead of attaching to it the notice of lien, they set out what it contained, and it contains the same language as this one does here that is before you.

Now, with respect to that notice of lien the Court has this to say.

“This paragraph”—which refers to the paragraph of the stipulation describing the notice of lien—“describes a mere statement or notice of claim. Nothing alleged to have [100] been done amounts to a levy, which requires that the property be brought into legal custody through seizure, actual or constructive, levy being ‘an absolute appropriation in law of the property levied upon.’”

Then a whole flock of cases.

“Section 3692” — that is referring to the 1939 Code—“does not prescribe any procedure for accomplishing a levy upon a bank account. The method followed in the cases is that of issuing warrants of distraint, making the bank a party, and serving with the notice of levy copy of the warrants of distraint and notice of lien * * * no warrants of distraint were issued here.”

I was quoting from the book.

Actually no warrant of restraint was issued here, never alleged, never proved. No warrant of restraint here at all. That is only one case, and in the little memorandum I handed to you, Judge, there are more cases.

The Court: The provision of the Code which I just read you from Scott says they are liens.

Mr. DeLew: Yes, Judge, but that doesn't give rise to this case.

The Court: Well, it gives rise to the portion of this case concerning foreclosure.

Mr. DeLew: Judge, with respects to the foreclosure, may I point this out, that the pleading is his way: Leuschner, and it has always been bandied about here about suing the bank, [101] but they also sued Erida Reichart, who is one of the trustees. The bank wasn't sued alone by Leuschner, they were both sued as co-trustees. All right. Now, that's prayed for these funds, and so forth. Then the bank brought the Government in under the third party, under the cross-complaint in the state court. It was removed here and the only Govern-

ment pleading in that case, outside of a motion to dismiss, which was denied, the only Government pleading in that case was in answer to the bank's cross-complaint. Now, in order to bring a foreclosure against Leuschner they would have to bring an action against Leuschner and attempt to foreclose this. They can't bring that foreclosure merely by answering that bank's cross-complaint when they don't raise any cross-complaint of their own against Leuschner.

Now, I don't think that would be material here because I don't think their act is one to foreclose.

The Court: What do you say to that, Mr. Dealy?

Mr. DeLew: The actual foreclosure wasn't even mentioned.

The Court: Let's see what you have to say in answer to that.

Mr. Dealy: Your Honor, I was just going to dig out the pleadings on this.

The Court: Well, apparently you haven't proceeded against the taxpayer to foreclose.

Mr. Dealy: I believe we have, your Honor. I think I [102] will find it here in a minute.

The Court: All right.

Mr. DeLew: The taxpayer hasn't been proceeded against in any way by the United States.

Mr. Jenks: Maybe we could take a short recess while Counsel is looking through the pleadings.

The Court: Yes, we will do that.

(Short recess.)

Mr. Dealy: Your Honor, I have taken the liberty of laying out there part of the file which is the

answer of the Government to the cross-complaint, that is the third page and our prayer at the bottom. In that we pray for the foreclosure of tax liens against the interests. If your Honor desires, we could here and now make a motion.

The Court: Well, the Court doesn't desire anything, gentlemen, this is your lawsuit. You just asked me to decide some issues for you here and I'm here to decide them and the Court doesn't desire a thing at all.

Now, this is the Government's answer to the cross-complaint. In the first place, the complaint is filed by Leuschner against the bank.

Mr. Jenks: The bank and the other co-trustees.

The Court: And the other co-trustees.

Mr. Jenks: That is correct.

The Court: And the bank and the other co-trustees join [103] in this cross-complaint?

Mr. Jenks: No, the bank made the cross-complaint, strictly interpleader cross-complaint setting forth the fact that this was claimed both by the Government and by Mr. Leuschner, requesting that Mrs. Reichert and Mr. Leuschner both come in and assert any claim—Mrs. Reichert and the Government, and come in and assert any claim which they have, and the bank be permitted to deposit the money in court and be relieved of the liability. The deposit has not been made.

Mr. DeLew: Page two, top of the page, that is the Government's answer, your Honor:

"The United States of America by the undersigned, its attorneys, for its answer to the cross-

complaint of the First Western Bank and Trust Company,"

And then it goes on.

The Court: Yes, this is an answer to the cross-complaint and if this is a bill to foreclose the lien, why,—

Mr. Dealy: Your Honor, we will now move the Court to permit us to amend that to entitle it a complaint as far as the latter—a counterclaim, as far as the last page which sets out our liens, the assessment and prays for foreclosure.

Mr. DeLew: Well, I am going to object to that on the ground that it comes too late in this proceeding. If you have an action to foreclose, bring it later on. You can always bring an action to foreclose a lien. [104]

The Court: I don't believe, Mr. Dealy, that after the evidence is closed, after you have a stipulation of facts agreed upon and presented, after we have had upwards of three or four hours, three and a half hours of argument and about to submit the case, I don't believe then you can come in, by an informal motion and somehow amend an answer to the cross-complaint of the bank and turn that answer to a cross-complaint of the bank into a bill in equity to foreclose the Government's lien.

Mr. Dealy: Your Honor, we stated in our opening statement we proposed this as an action to foreclose the lien. We have asserted that from the very outset of this action.

The Court: The trouble is you haven't any pleadings on it.

Mr. Dealy: Yes, your Honor, we have this statement in here in which we specifically say that the interest of Richard Leuschner and the trust to the extent——

The Court: The trouble is there isn't any pleading against Mr. Leuschner. That isn't in any pleading against Mr. Leuschner.

Mr. Dealy: This, your Honor——

The Court: Other than in your answer to the cross-complaint of the bank.

Mr. Dealy: Your Honor, this is an answer to the cross-complaint filed by First Western Bank, and it reads First Western Bank versus Richard Leuschner, Erida Leuschner Reichert, and United States of America, and in our answer we set up as our [105] third separate and affirmative defense our right to foreclose our lien against the interests of Mr. Leuschner and have it applied to the extent of the interest to the lien.

The Court: Well, you gentlemen told me at the beginning of this matter this morning that you were ready. It would seem to me you aren't ready at all in this lawsuit, Mr. Dealy. I don't think the pleadings raise the issue of an attempt on the part of the Government to foreclose a lien against Mr. Leuschner at all. If you are going to foreclose a lien you have to file a proper bill for foreclosure, with all of our notice of pleading and our insistence in the rules upon substance and not form. If you think you have a right of action to foreclose a lien against Mr. Leuschner, it seems to me you must file

a pleading which names Mr. Leuschner as a defendant, you folks as the petitioners to foreclose.

I don't believe you have a petition to foreclose the lien here at all. All you have done is announce that your intention to do it, but are you doing it?

The motion is denied.

Let's proceed. We'll proceed with the matter on the present pleadings and dispose of it on that basis.

Mr. DeLew: Now, your Honor, so much for the notice of levy. I just want to call to your Honor's attention, your Honor probably already has it in mind, but just to complete the record, none of the other trustees were served even with [106] this so-called notice of levy which the Government claims is a lien.

Now, the last point we raise in this on our behalf—oh, and before I forget it, there is a line of cases that is headed by U. S. against Brechtel, 19 Federal 2nd 516. Unfortunately I didn't get that case, but that case makes the bald statement that a so-called notice of lien, as we have here, was served on one of the trustees of a school district and it had some designation on it other than the school district.

The court there held in a similar case what the Government's bringing against the bank, that the action would not be maintained, could not be maintained because where a notice was addressed to one other than the person who was charged with the duty of withholding the funds, then the persons who were charged with the duty of withholding the

funds did not need to pay attention whatsoever to that notice.

I just give you that for what it is worth to assist the bank in one of its positions, and there we are.

Now, with respect to the bankruptcy adjudication about which the storm reached this morning, it is, of course, the position of Mr. Leuschner here that this matter has been adjudicated there in the bankruptcy court. There the trustee in bankruptcy is representing all creditors, among which was the Government, which had a preferred claim and which was not subject to any exemption. In that case the trustee went after [107] this trust. It was denied.

Now, in the case of Maryland Casualty Company against the United States, a Federal Supplement case, 32 Federal Supplement 746, the facts are long and involved, your Honor, but I will just read, your Honor can examine it, but just read what the court said concerning this particular point.

“The judgment of the Referee in Bankruptcy stands in an altogether different light from the judgment on the bond. Under the statute and all the decisions, the judgment rendered by him was in effect the judgment of a court and entitled to the same credit and standing. The judgment was not only upon the merits but entered upon a claim presented in behalf of the United States by a party duly authorized to act for the defendant.”

This was a tax claim, too, an income tax claim.

“It may be, as contended by defendants, that it now appears that the decision of the Referee in

Bankruptcy was contrary to the actual facts in the case. But if so, there should have been an appearance for the collector or the defendant before the Referee when the claim was heard and evidence introduced in behalf of defendant, or at least an appeal taken from the decision. Neither the defendant nor any of its representatives did anything, although an opportunity [108] was given for a hearing and there was nothing to prevent an appeal. Under these circumstances, the decision becomes final.”

Now, that is exactly the situation here. The Government was in the case, the bankruptcy case. They had a claim before him, the matter of this trust was before the court. The trustee briefed it—I wanted to put the brief of the trustee in that case in evidence, which is antagonistic to our side, but Counsel objected, so it isn’t in. But there the whole issue was before the court. The Government simply did nothing. You can’t force them to act, and the Referee, for reasons of his own, based on what he considered to be the law, made his decision. Now, that decision, in my mind, is final.

Now, Mr. Dealy mentions about the exemptions of the United States—or the exemptions of the State of California affecting the bankruptcy proceedings, so forth and so on. But again I say it was not reached on that question, on the real question before the Court here and, as we discovered, the spendthrift trust, itself, this section 849 of the Civil Code, section 859 of the Civil Code, this support provision here, wasn’t an exemption statute at all.

It's a property right that must be respected by the United States. Very definitely so.

I think that's the position of the defendant Leuschner in this proceeding, if your Honor please, and I don't want to [109] take too much time of the Court, we are running a little late this afternoon, unfortunately, but I think there are other cases as well, I don't want to bring them before you, Judge, they all say the same thing. They are noted in my little memorandum. They all say the same thing and there's no use going into them and my reading them to you. They all go to the same point.

But I am honestly of the view that in a situation like we have here where we have got an adjudication in bankruptcy, where we have got defective notices of levy, where they weren't even served on the proper people, and the notice itself is no more than a notice. It is not a levy. The Internal Revenue points that up very well.

Actually under the Revenue Law a levy is not defined. We know it is recognized, to most of us, on the ground that the sheriff or marshal comes along and levies a writ of attachment or execution. It's a seizure.

Now, the levy is something that has to be levied. Now, as we grow up in the law and tax work—the gentlemen should know more about them than I do—these tax works and cases all go to the warrant of distraint. That's the thing that must be levied. That's what they are talking about when they are talking about a levy, and without the warrant of

distrain't you haven't got a levy. And the notice of levy means nothing.

Thank you, your Honor. [110]

Mr. Jenks: Your Honor please, I will be very brief. I will try to summarize the points.

We contend, as Mr. DeLew just did, that the notice is defective. Even if it is correct, it caught nothing. There was no money then due Leuschner from First Western Bank or from any of the trustees. It certainly could not catch any of the trust proper which, while some of it physically in the possession of the bank, only as one of the trustees and we all know that the trust property is owned by all trustees, even if by a state law or by agreement, two or less than all can act in accordance with it, the type of trust that is imposed in all trustees.

If they are seeking here, as they now contend, when they realized they didn't catch any money, that they have caught his right to future payments, again, he has no right to future payments from the bank, only from the three trustees. And again as I have said, they say we are dealing with a penal statute which must be strictly construed and my reading of it, particularly when it refers to interest at six percent from the date of the levy must be referring only to debts due or property held on the day of the levy and not to any after credits, and as I read to your Honor this morning, the notice of levy itself speaks in the present tense, and more important, the final demand, which says in the last printed paragraph, and I understand these documents are attached to the stipulation of facts: [111]

“Demand is again made for the amount set forth in the notice of levy, \$207,665.42, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served.”

Now, that is the demand, such lesser sums as you, trust officer of the bank, read it if you want, may have been indebted to the taxpayer at the time the notice of levy was served.

We are not indebted to the taxpayer in any sense in any amount on July 22 and it became indebted to him on July 31st for six hundred and some dollars.

But I think under the trust agreement, if he had died in the meantime it would not have gone to him, it would have gone to his children as successor life beneficiaries—life income beneficiaries.

It is my thinking in this case that judgment must be in favor of the bank on the so-called penalty action.

In the other action the bank's position is as set forth in our cross-complaint. We want to pay this money to the person entitled to it. If your Honor decides under the bankruptcy or under the terms of the California Law that Mr. Leuschner is entitled to sufficient money for his support, we want to follow the final order of this court; pay it to the Government, pay it to Mr. Leuschner. How we will work it out, if they pay it to the Government as to succeeding amounts, I don't know; maybe we'll have to do this from time to time. I think that [112] Mr. Troxel will agree basically with what I am saying, he might want to add a few remarks,

which brings me to the final thing which I have mentioned two or three times and that is attorney's fees. As I told you earlier, there are two theories, one that a stakeholder is entitled to fees out of the fund, and there is federal law to support it; one or two cases against it. We think the authorities in support are stronger. The other is the specific provision of the trust agreement itself that the trustees do not have to settle controversies, they may require legal determination and entitled to be reimbursed for their costs, for the attorney's fees. I feel that under that if I had been sending bills to the bank each month that we would be paid and entitled to be paid.

I am prepared to testify, if anybody wants me to, that we have a total of a hundred and forty hours of lawyer's time in this matter. Probably about seventy five or eighty of it is my time as our senior litigation partner; the balance is the time of Mr. Haynes, one of our junior partners.

Because the Government suggests that we are not entitled to any fees in the penalty action because they see this fee coming out of this \$15,000 that they hope to get—of course, if they don't get any part of the fifteen, they shouldn't care about the fee. I have tried to segregate it, but it is hard to segregate it when you are working on two such closely related cases. The most I can say that I could segregate the so-called [113] penalty action would be thirty three hours out of the one hundred and forty. We feel, if we were left free to do it, I would send the bank a bill for \$3500. I wouldn't

attempt to segregate it. It isn't strictly on an hourly basis. If you figure the whole one hundred and forty hours, it comes to \$25 an hour but it is not strictly on an hourly basis. If we take out thirty three hours that would leave a hundred and seven hours divided into \$3500, a little over \$30 an hour.

So that is my final comment in this. If your Honor will accept those statements, if Counsel will, all right, if you want me to go on I will do it. However, if Counsel says they will accept those statements——

The Court: Does anyone desire to have Counsel sworn and testify to the time and amounts and so on?

Mr. Dealy: No, your Honor, we will accept his statement as to the time.

Mr. Jenks: We have a bill for the bank here for incidentals that came along, like notary fees.

The Court: Well, as I understand it, Counsel, all Counsel concerned here have agreed that we need not have sworn testimony on the subject of attorney's fees.

Mr. Jenks: Thank you.

Mr. Troxel: If the Court please, the defendant Erida Leuschner Reichert is not interested in the penalty action at all. However, she is primarily interested in the state action [114] of Leuschner versus the First Western Bank, which was removed to the Federal Court and became action 35,416. In that action there is a prayer against the defendant for the payment to him of a sum equal to the amount of money that the trustees have held back, and we be-

lieve that in view of the facts and the law that my client, as a co-trustee, was justified in withholding payment, and accordingly we will ask for judgment in our defendant's favor in that particular action. I don't know whether you asked for judgment for that one or not in your statement.

Our office has not participated anywhere near to the extent that counsel for the bank has. I have gone over my files and records and I find that as of four o'clock I have approximately nineteen and three quarter hours of actual time spent, which I suggest could be rounded off at the usual figures of \$25 an hour for twenty hours, if that is agreeable, or if you wish I will also take the stand and testify as to the time I spent on motions, appearances, depositions, preparing pleadings, and research.

The Court: Well, I understand that Counsel has no objection on that.

Mr. Dealy: We will agree on the time, amount of time, your Honor.

The Court: Do I understand you to mean by that, Counsel, that you desire testimony as to the reasonableness of these fees? [115]

Mr. Dealy: We contend, your Honor, they aren't entitled to any fee.

The Court: That is something else again.

Mr. Dealy: It is up to the Court to set the fee.

The Court: Yes, I understand that, but the way you limited your consent, you say you don't require testimony as to the amount of time. What I want to know is are you now raising the question as to the reasonableness of the fees? In any way?

Mr. Dealy: We feel your Honor is competent to set the fee if any fee is allowed.

The Court: You don't require any testimony?

Mr. Dealy: We don't require any testimony on the reasonableness of the fee.

The Court: All right.

Mr. Dealy: But we will not agree on the fee.

The Court: I am not asking you to agree on it.

Mr. Troxel: Your Honor, we wish to be released from any and all liability for having concurred in not making payments to the beneficiary and we wish reimbursement for the trustee out of the trust proceeds in accordance with either the interpleader theory or the provisions of the trust agreement itself. Thank you.

The Court: Is there anything further?

Mr. Dealy: Your Honor, I only have a few concluding [116] remarks here.

The Court: It is past four o'clock. Is it going to be inconvenient for any of you to come in in the morning?

Mr. Dealy: Your Honor, I would like to return to Washington as soon as possible and I have about five or six other matters that have been held up by the trial this week and this case and they have to be done before I leave town. I was due back, I am due back in Washington on Monday morning.

The Court: You operate out of Washington?

Mr. Dealy: That is correct. Mr. Langley and I are from the Department in Washington.

The Court: I see. The Department of Justice?

Mr. Dealy: That's right.

The Court: Now, I had in mind if we got together tomorrow morning for a little while, I will give you overnight to dig up any cases, anything else you need to look up, that maybe we could arrive at a decision in this matter.

I don't think there is going to be any very probable purpose served by waiting on briefs in this case. I have a notion that if—may be wrong, and if that turns out to be wrong tomorrow, why, we won't decide it, of course. I will not decide the case until I feel competent that I know what the answer is, but we have a pretty clear picture now of what is going on here.

Mr. Dealy: If your Honor so desires, why, we will be [117] able to be back tomorrow morning.

The Court: You're here in town and if we lose you now it will be some time before you get back again and I'll be over in Salt Lake City, you know.

Mr. Dealy: That's right, your Honor.

The Court: And we ought to try to conclude this matter. I wouldn't mind coming over to San Francisco again, but I wouldn't feel justified in coming over to wind up some business that we ought to have wound up tomorrow, you know.

Mr. Dealy: All right, your Honor.

The Court: Is that agreeable with the rest of you?

Mr. Jenks: Yes, your Honor.

Mr. DeLew: Yes, your Honor.

The Court: Recess, then, until ten o'clock tomorrow morning.

(Whereupon an adjournment was taken in

these proceedings until ten o'clock a.m. Friday, March 8, 1957.) [118]

Friday, March 8, 1957, 10:00 o'clock A.M.

The Clerk: United States of America vs. First Western Bank for further hearing.

Mr. Dealy: Ready.

Mr. Jenks: Ready.

Mr. Troxel: Ready.

Mr. DeLew: Ready.

Mr. Dealy: Your Honor, I have here one opinion which your Honor referred to, or was referred to in the Scott discussion yesterday.

The Court: What case is it?

Mr. Dealy: This is the Maryland decision.

The Court: It talks about spendthrift trusts?

Mr. Dealy: It does, and——

The Court: I don't think there is any question about that.

Mr. Dealy: This has an additional reference, your Honor, on our discussion of whether or not this spendthrift trust is recognized by state statutes.

The Court: I don't think that makes any difference in this case. I am prepared to rule on this spendthrift trust matter. We had that out yesterday and I am prepared to rule on that on the authority of the 1947 amendment to paragraph 157 of the American Law Institute Restatement on trusts and [121] on the authority of Scott, volume II, section 157.4. The provision of the restatement to which I refer says:

“Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be

reached in satisfaction of an enforceable claim against the beneficiary, by the United States or a state or a subdivision thereof, to satisfy a claim against the beneficiary.”

Now, that restatement, of course, as you all know, is the result of the labors of the best minds in the profession on this subject, both the bar and bench and the law school people, and moreover, it is supported by the cases that Scott refers to. So so far as the spendthrift trust is concerned, I think we should take that view of the matter.

Now, I should like to start this morning with the argument by Counsel for the taxpayer, and I should like to take points up point by point.

Now, I believe in your memorandum of points and authorities you start off with point one, a reference to the code. Now, let's get our eye on that code. That is Title 26, isn't it?

Mr. DeLew: Yes, Judge, I have it right here.

The Court: Now, let's put our eye right down on the language of that provision and see what it says and I think we can come to some conclusion about it this morning.

Mr. DeLew: Judge, may I read it? [122]

The Court: I prefer to put my own eye on it. My receptivity by ear is not as clear as it is by eye.

Which part do you wish me to read. That's 6332(B). Yes. All right. Penalty for violation. Now, this is the bank's position rather than——

Mr. DeLew: I think I meant the whole section there, A and B.

The Court: All right.

Mr. DeLew: Judge, in 6332(A) the argument runs this way: May I point it out? It reads any person in possession of property or right to property subject to levy upon——

The Court: You're not reading it all: "any person in possession (or obligated with respect to) property or rights of property subject to levy." Now, isn't the bank obligated with respect to that?

Mr. DeLew: No.

Mr. Jenks: Your Honor please, do you want the attorney for the bank or the attorney for the taxpayer to explain——

The Court: I don't want to discuss the bank's aspect of this case at this point.

Mr. Jenks: All right.

The Court: I would like to get the taxpayer's position clear, dispose of that. I think the rest is on a somewhat different basis. I am not sure the bank will be liable for any penalty no matter what happens to the taxpayer. So that [123] at this point I would like to see what is happening to the taxpayer.

Mr. DeLew: The argument is this, Judge: That code section provides that before the government's action can be brought, that is, the second government action against the bank, in which we are also a party——

The Court: That is to foreclose the lien.

Mr. DeLew: Well, both of the parties——

The Court: I don't believe you have got any foreclosure of a lien here. There isn't any action, nothing before us.

Mr. DeLew: No.

The Court: With respect to that I will come to that shortly.

Mr. DeLew: So then directing our attention to the first suit——

The Court: Yes.

Mr. DeLew: Now, before that action can be brought certain conditions must be met. There has to be a levy on the property. Now, the defendant must be in possession. Now the first question to be answered, was the bank in possession. The taxpayer says no, the bank is not in possession. Bear in mind, now, Judge, that what happened here was an attempt, or rather delivery of a so-called notice of levy on the bank alone directed to a trust officer. That's what happened here.

Now, the taxpayer says, no, the bank isn't in possession [124] the possession is that of the trustees. It's the taxpayer in this case, the bank, and his sister, Ida Reichert, the three trustees we have been talking about. The property is in the possession of those trustees. Now, it doesn't make any difference which pocket I put these keys in, it's all me. This trust is all the trust, and because the bank did this or that it still is the property of the trust. That section requires possession before levy can be made, even a good levy.

The Court: Well, if the bank didn't have possession, nobody did, because the bank was holding those securities and the bank was holding those monies. Now, of course, if the levy is upon the right, why, it is intangible and nobody has posses-

sion of that sort of thing. But the trust reads "securities."

Mr. DeLew: And real property.

The Court: Primarily, and that fig farm, a piece of real property. I don't know who actually was in possession of that, I don't believe there is any evidence on that, but so far as securities are concerned, that is the bulk of this estate.

Mr. DeLew: Yes.

The Court: The bank had those in its vaults, and moreover the bank had the money.

Mr. DeLew: Well, don't you agree, Judge, that possession of one of the trustees—let's assume this: let's assume [125] that there's a trust in my office and actually I am receiving dividend checks, although directed to the trustees, I put them in my bank and I pay out the funds. I am not a trustee at all, I am just the lawyer for it. Now, wouldn't my possession be the possession of the trustee? Would I be said to be in possession? I'm a mere clerk.

The Court: I think that's right, I think that a possession would be the possession of the trustees, but the government's got hold of one of the trustees.

Mr. DeLew: Yes, Judge, but by a notice of levy that is directed to only the trust officer in a bank, wasn't even directed to the bank.

The Court: Now, in your second point you say no effective levy has been made here against the defendant bank for any purpose, and you refer to some authority. Now, what's that all about? You refer to 6331.

Mr. Delew: Yes.

The Court: Now, 6331, subdivision A, says:

“If any person liable to pay any tax neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property * * * belonging to such person or on which there is a lien provided in this [126] chapter for the payment of such tax. Levy may be made upon” —Well, several things here.

Mr. DeLew: I think that's important.

The Court: All right, I'll read it.

“Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer * * *” I don't see that has any application here. Let's read it all first.

“If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the ten day period provided in this section.

“(b) Seizure and sale of property. The term ‘levy’ as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon

property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).” [127]

And then there is something about successive seizures.

Mr. DeLew: I don’t think that applies here.

The Court: All right, this is pretty broad. They say the term levy, when used in this title, includes the power of distraint and seizure by any means.

Mr. DeLew: Yes, that’s right.

The Court: Go ahead.

Mr. DeLew: Now, I call your attention to the reference to “notice of levy”.

The Court: Where is that?

Mr. DeLew: “Levy may be made upon the accrued salary or wages of any officer, employee, * * *” et cetera “by serving a notice of levy * * *”

The Court: “On the employer”.

Mr. DeLew: Judge, that is the only place in the entire Internal Revenue Code where a notice of levy is mentioned, and that’s the document that is served in this case, and it has no application to that type of thing. Now, that’s what they served here, a notice of levy.

The Court: Well, what do you think they should have done with the bank?

Mr. DeLew: If they were going to bring such an action, there is only one thing to do and that’s bring a warrant of distraint. That lays the groundwork, of course, for such a thing. [128]

The Court: I don’t think that they should be limited to distraint, because it is in the alternative.

It says, "the term levy as used in this title includes the power of distraint and seizure by any means."

I will tell you there is some analogies in the law of trusts about that. Suppose the beneficiary assigns his beneficial interest in somebody. Suppose, as a matter of fact, he assigns his beneficial interest to two or three somebodies successively. Successive assignments of the same interest by beneficiary. Of course, he has perpetrated a fraud.

Now, there is quite a body of law about that, and I believe it is the law that the first fellow who notifies the trustee of his assignment has a priority.

Now, there are two views, of course. There is the line of authority which says first in point of time, but there is another line of authority, and I believe it is the prevailing view, that the first assignee to notify the trustee has priority. And the courts place that upon the ground that by the notice to the trustee there is a sort of a seizure, that the trustee is holding the reins, this fellow comes and claims from the trustee and that's all he needs to do.

Now, what more is necessary, what more is necessary anyhow?

Mr. DeLew: He has three trustees.

The Court: What do you think the government should do? [129] What is a levy? Well, the Congress has defined what a levy is for this purpose; it's a distraint and seizure by any means—includes the power of distraint and seizure by any means. It isn't just the power of distraint, it is the power of seizure.

Mr. DeLew: Yes.

The Court: By any means. Now, one means that is familiar in trust law of asserting your claim of the trust property is to give the bank a notice.

Now, no prudent bank after such notice would turn the receipts or income over to the beneficiary. And the practice the bank followed in this case is not only the normal practice, but I imagine that it's never departed from. I can't imagine the bank, after having received this notice, turning over the income or the corpus to the beneficiary. Banks just don't operate that way. This, it seems to me, is a most effective way of taking hold of it.

What else do you do? You say a warrant of distraint. What would you do with a warrant of distraint that they didn't do with this notice. You get a warrant of distraint, you carry it down there and leave it with the trust officer. That's all you do.

Mr. DeLew: I would direct it to the trustee, certainly, direct it to the real parties. I might have left it with a bank, but I would also leave it with the other people as well. [130] I think that's the way to reach the situation.

The Court: What I am trying to straighten out this morning, I'm trying to take each segment of your argument and talk about each one separately, if we can. Now, if all you're talking about is this notice was served only upon the bank and not upon the other trustees, I understand that, we are going to take a look at that in a minute, but at this point I understand your argument is wider than that, you're objecting to this just being a notice.

Mr. DeLew: Yes, I have several cases.

The Court: We have our eye on that facet of your argument at this moment. Now, I have some difficulty seeing what else the United States is obligated to do in view of this provision.

Mr. DeLew: Well, may I call your attention to several cases, Judge?

The Court: I would be very glad to have you do so.

Mr. DeLew: The case of United States vs. O'Dell, 160 Federal 2nd 304. May I give it to you?

The Court: Yes.

Mr. DeLew: I think the second headnote covers it, United States against O'Dell, headnote number two.

I think at 308, the words beginning with "Sections 3692," which is now 6331 by reason of an amendment does not prescribe any procedure for accomplishing a levy. [131]

The Court: Now, let's see, what kind of a case is this? This is an action to collect from a trustee for the benefit of creditors of an insolvent corporation, certain unpaid excise taxes which had theretofore been assessed.

Well, the government failed to comply with the statutory requirements here to obtain a lien. This involves a construction of a different statute, it's section 3710.

Mr. DeLew: Well, 3710, I can't connect the 39 and the 54 code that quickly, Judge. You see, a lot of those sections——

The Court: Maybe the government can straighten us out.

Mr. Dealy: Your Honor, one major distinction between the 39 and 54 code is that in the 1939 code there was a provision for a document which is known as a warrant for distraint, but there is no such provision in the 1954 code. This section which Counsel has read and which you have read today refers to restraint or seizure, has reference to the situation where the collection officer actually goes out and physically seizes the property, such as, I'm sure your Honor is aware of the fact that we have actually seized movie actresses homes and put them up for sale, put up a sign and they are sold. That is distraint that is meant there. But in the 1939 code there was a document called warrant of distraint, but since this levy was made under the 54 code there is no such provision.

Your Honor, I would have to get the two sections and look at them because when they relabeled the sections, they relabeled [132] me out of business.

Mr. DeLew: May I say this, Judge, in deference to Counsel, at the same time the warrant of distraint comes to us from the common law, it doesn't come to us from in the Internal Revenue Bureau.

The Court: Yes, I know. The landlord went up to pick up the cattle of the tenant to pay the rent, that's how it started, and he actually picked up the cattle. Well, if you are limited to that sort of a thing, there's a lot of stuff that we have nowadays that you can't pick up like that.

Mr. DeLew: That's right.

The Court: This physical seizure idea doesn't follow through.

Mr. DeLew: That's what that case holds, Judge.

The Court: No, I don't think so.

Mr. DeLew: And here's another one that says the same thing. They all go the point where a notice of levy is a threat, it isn't a levy.

The Court: What does the notice say that was given to the bank, is that attached here to the stipulation?

Mr. DeLew: Yes, it is.

Mr. Dealy: Yes, your Honor.

The Court: Notice of levy. Oh, well, it's a form.

Mr. Dealy: Yes, your Honor, there is no form what you would call a levy form. Whenever a levy is made a notice of [133] the levy is served on them and that is, in fact, the levy.

The Court: Now, this form is pretty explicit. It says:

"Accordingly, you are further notified that all property, rights to property, monies, credits, and bank deposits now in your possession and belonging to the taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer are hereby levied upon and seized * * *"

Mr. DeLew: Which is the same language used in the O'Dell case, Judge.

The Court: No, it isn't. This O'Dell case, the stipulation says, that gave written notice to the defendant that the tax assessments were unpaid, due and further notified—(reading to himself).

Yes, it does. I apologize to you. Seized and levied upon for the payment of said taxes.

Mr. DeLew: Judge, if I may say something further.

The Court: What do you say about this case? Are you familiar with this case?

Mr. Dealy: I'd have to read it over again, your Honor. I believe I have read it in the past, but I don't believe it has any application, your Honor, because one of the points in this case is that when the bank was sued by Mr. Leuschner the bank interpleaded the United States.

The Court: Yes. [134]

Mr. Dealy: And the United States—the interpleader was to the effect that we have this fund of money which is claimed and we want to know what the claims of the other people are, and you are required to state your claim.

The Court: Yes.

Mr. Dealy: Well, in its answer, the United States did state affirmatively that it had a claim to the money by virtue of the tax lien, and that under the lien it wanted the money paid to it. Now, the levy is a post lien operation, so to speak.

The Court: Yes.

Mr. Dealy: So in this case, your Honor, we have a valid tax lien and we have stated our claim to the money, which is before the Court. That is, in effect before the Court. I take it Counsel agrees, is that right?

We pleaded you wanted to pay it into it.

Mr. Jenks: Less attorneys' fees.

The Court: Well, we are going to work on that in a minute.

Mr. DeLew: I think Counsel goes to the matter of possession, we are going to the question of levy here.

The Court: In this O'Dell case the action isn't against the taxpayer, it is against the bank.

Mr. DeLew: Yes, as I recall——

The Court: That is, a levy against the trustee.

Mr. DeLew: Yes, as I recall.

The Court: The suit is against the trustee and this Court is confronted with the difficult situation of sticking the bank, or sticking the trustee and not sticking the taxpayer.

Now, you have the taxpayer here to defend and that's what I am talking to you about.

Mr. DeLew: Yes.

The Court: Now, the O'Dell case isn't in point.

Mr. DeLew: Well, I think it goes to the——

The Court: No, it doesn't. It's against the trustee or the bank. Now, what I want to know is, show me a case where they let the taxpayer out on this kind of a situation. That's what we are talking about now.

Mr. DeLew: Well, I thought we were addressing ourselves right now to the effect of the levy.

The Court: Well, yes, as to the taxpayer. You got a taxpayer here and the bank is holding his property and you have brought a suit against the bank to recover it, or part of it. Now, I am going to have to dispose of that suit here and we are talking about shall this judgment be for Leuschner against the bank, or shall this be a judgment for the bank, no cause of action in this case. Now, that's

the part of the case I would like to have you clear up a little bit for me. Now, the O'Dell case doesn't reach that. Have you any other [136] case that reaches it or where you got the taxpayer suing the bank where the government has noticed the bank that they have a tax lien and where a court lets the taxpayer recover against the bank because the bank held up the payments on account of the levy.

Mr. DeLew: Judge, I have researched this thing as well as anybody could possibly do——

The Court: I am sure you have.

Mr. DeLew: ——and I have not been able to turn up a case precisely on all fours with this one. What I have been trying to do, I have been trying to pull it together piece by piece on the basis of principle.

The Court: Well, we're looking at them.

Mr. DeLew: Now, as to the general subject, I was trying to address myself to what I thought the Court had in mind.

The Court: What I have in mind, I have already given you the analogy that I have in mind and on which I am disposing to deal with your levy question, as far as the taxpayer is concerned. Here the trustee, namely—let's take for the moment that the bank is trustee. Here is a trustee. He holds property in trust for a beneficiary, Mr. Leuschner. Now, the United States comes along and says we now have a claim against that property which is paramount to Leuschner's, turn the property over to us.

Now, the analogy on that is successive assignment of a [137] beneficial interest, really. I don't think

there's any question about it. The cases generally in this country hold the case of successive assignments, assignee who first gives notice to the trustee has priority.

Now, that is done upon the ground that's all you need to do to assert your claim against the trustees, all you need to do after that notice, the trustee is obligated to hold it for you.

Now, you may have an interpleader situation where the trustee isn't sure of what to do, he wants it litigated, as here.

Now, I think the United States, in view of the broad provision:

“The term ‘levy’ as used in this title includes the power of distraint and seizure by any means.”

I think that would include seizure by a notice of levy.

Mr. DeLew: Yes, seizure.

The Court: I am talking about seizure, by a notice of levy in the language of this form that the government has. It says:

“Are hereby levied upon and seized for satisfaction.” You mean they would have to go down to the vaults and pick up securities and put them in the pocket of the collector and walk off with them? Do you think that's necessary?

Mr. DeLew: No, but I do say it is necessary to have a [138] warrant of distraint. That is the time honored method of doing it.

The Court: Well, I am prepared to rule on that point right now. I think this levy here sufficient, as far as the taxpayer is concerned. I am not talking about the bank, I am talking about the taxpayer, between the taxpayer and the bank and the levy between the taxpayer and the government in their respective claims against the bank, I think this is a sufficient levy.

Now, let's get down to your next point, no levy has been attempted to be served on any of the other trustees. Here you have a point that only one trustee was served with this notice. Now, have you any authority on that subject?

Mr. DeLew: No, but I do have authority for the fact that where, as I mentioned at least to you yesterday, that there is one case that deals with the subject where a school district held certain funds and the notice was given to someone other than the district trustees. The court held that they didn't have to pay any attention to it. That was the case where there were three trustees of the school district and the notice of levy—I think it was a warrant of distraint—was given to someone other than the three trustees and did not name the three trustees, and it was held there they didn't have to pay attention to that. I didn't get the volume down, Judge.

The Court: Where was it decided?

Mr. DeLew: It is the United States against Brechtel, 90 Federal Second 516. The third head-note says:

“A notice of the levy of a federal tax on money

due a taxpayer from a county and notice and demand for surrender of such money to the collector of internal revenue were not binding on the county when addressed only to the chairman of the board of supervisors and not to the county.”

If your Honor is interested in looking at that.

The Court: No, I don't think it bears any relation to this. Where was it decided?

Mr. DeLew: The Eighth Circuit, Judge.

The Court: No, I don't think so. The Eighth Circuit is a very good circuit; it used to include the Tenth.

There ought to be, and I didn't take the trouble to research that myself, but there ought to be some analogies in the trust law about that where you have two or more trustees. May notices be validly served on one. Let's take a look for a minute.

Mr. Jenks: Your Honor, that is the same edition that we have and we don't find anything directly on it, but you might look at Section 194, or is that the 1956 edition?

The Court: Yes, this is 1954.

Mr. Jenks: We didn't find anything directly on it. In [140] fact, this section is merely authority that the co-trustees generally must act together, but we weren't able to find anything.

The Court: What is the paragraph?

Mr. Jenks: 194, your Honor.

The Court: Well, the rule is they can't delegate.

Mr. DeLew: That's true.

The Court: The rule is that they all have to concur.

Mr. DeLew: In our Section 863 is says:

“Except as hereinafter provided every express trust in real property, valid assets, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiary takes no estate or interest in the property, but may enforce the provisions of the trust.”

The Court: Well, let's see (reading).

Well, serving notices upon trustees, how about that? The trustees can authorize one of their number to exercise the power where the power is of such a character that there is no improper delegation. How about that? Is it improper delegation to let the bank hold these things in their vault, let the bank put the monies they collect in the account, is that an improper delegation, you imagine by the three trustees?

Mr. DeLew: Isn't it merely clerical?

The Court: Well it's more than that, it is a trust [141] committee reviewed the investments and made recommendations. As a matter of fact, the bank was running this trust.

Mr. DeLew: But they didn't exercise one of those recommendations until they had the consent of all.

The Court: I understand that. They didn't sell a security and they didn't buy a new one until they had the concurrence of all the trustees, of course. All we're talking about here is may you notify one trustee for all of them.

Mr. DeLew: And may you notify the trust offi-

cer of a—by serving an assistant trust officer of one of the trustees.

The Court: Well, I don't suppose you have to get to the whole board of directors.

Mr. DeLew: No, but I think you have to direct the notice to the bank.

The Court: I don't think you have to get the president of the bank.

Mr. DeLew: But don't you think it ought to be directed to the bank, Judge?

The Court: Well, let's see how this reads. It's directed to the trust officer, First Western Bank, San Francisco, account trust in which Richard D. Leuschner is partial beneficiary.

Oh, well, I don't think there is any problem about that, the trust officer. I wouldn't have done it that way, but I don't think there is anything fatal about it, being addressed to the trust officer. That isn't even a second or third rate [142] trust officer, it is the trust officer, and the trust officer is usually a vice president in charge of the trust department.

Mr. DeLew: I don't know.

The Court: Well, I can understand your interest in this thing. Let's see. There are several cases here, I hate to read all of them. I should think there ought to be something about notices. See if there is anything under notices.

Well, I don't see anything about it. I haven't made a very careful search, however.

Well, we will pass that one for the moment.

Now, your fourth one is property here sought is

not property subject to distraint. You mean because of the spendthrift trust provision?

Mr. DeLew: Well, no, Judge, but I think if you rule that the notice of levy in this case is sufficient, then that point goes out the window.

The Court: All right. Then the next one is number six.

Mr. DeLew: Yes.

The Court: That is Canfield that is spendthrift trust. That's a spendthrift trust you are talking about.

Mr. DeLew: Yes, Judge.

The Court: And so is six A.

Mr. DeLew: Now, before we pass that, I wish you wouldn't pass that so rapidly, Judge, it is very important.

The Court: Well, I don't know how you are going to get [143] around the provision of the restatement.

Mr. DeLew: Well, I think the restatement is quite all right, Judge, but consider this: it does not at all take into consideration the provisions of our code section 859.

The Court: Yes it does. You mean the support business?

Mr. DeLew: Yes.

The Court: Why, the restatement refers to it.

Mr. DeLew: Oh, I don't think so, Judge.

The Court: Yes, it does, it refers to support.

Mr. DeLew: I doubt that.

The Court: Let me read it to you again. I think it is perfectly explicit on that subject. It says:

“Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary by the United States.”

Mr. DeLew: Yes, but I don't think that applies to this type of thing.

The Court: What you're talking about is that the California Code provision turns the spendthrift trust into a trust of support.

Mr. DeLew: No, Judge. No. For example, consider this: Suppose I do an express trust, and I used the words for the support of my children. All right. Now, let's say for the moment that it provides such sums as \$2,000 a month for each [144] of my three children, and I used the words “for their support”. That would be the type of thing the restatement is talking about, or Scott on trusts is talking about.

Now, the California law provides that the idea of the spendthrift trust comes out of our Section 867 of the Civil Code of this state which provides for a spendthrift trust; but over and above it is the section to which I drew your attention, 859 there.

The Court: Well, Rosenberg answers that, the Court of Appeals in New York.

Mr. DeLew: It doesn't reach it, Judge.

The Court: Scott drew the 1947 amendment to the restatement with Rosenberg under his eye.

Mr. DeLew: I know, Judge, but looking at the Rosenberg case, it does not bear out that statement in there.

The Court: Well, New York had some similar provision.

Mr. DeLew: Judge, it wasn't raised in the Rosenberg case. The answer was obvious. Maybe the man had a thousand dollars coming in from other sources. We don't have that situation here. It just isn't covered in any of the cases. I have analyzed every case and I know, and I can tell you it isn't covered in any other case.

The Court: Well, all right. I will say this to you about the support. Uncle Sam isn't concerned in his collecting taxes about whether you have got enough money left to eat on or not. [145] Now, that's just as painful to me who is not a beneficiary of the spendthrift trust and to you who are not a beneficiary of the spendthrift trust as it is to Mr. Leuschner. The fact of the matter is the government has got to go on and in order to go on they have got to collect their taxes. We don't make any inquiry whether there is enough money left to support yourself.

Now, the whole purpose of paragraph 157 of the restatement, as amended in 1947, is to support that very policy, that the claim of the United States is paramount to any spendthrift or support provision of a trust, whether there is a state statute or not. As a matter of fact, the court in Rosenberg—I read this this morning—says that it is far from clear in New York that there is any policy of the entire state supporting a spendthrift trust against a tax claim of the United States. But if there were such a policy the policy of the state could not prevail

against a statute of the United States, the Internal Revenue Code and the income tax provisions. That's what Rosenberg is talking about. They use this language. I read it this morning.

Mr. DeLew: Yes, Judge, but that's purely an exemption statute, and I could go along with all these recitals from the textbooks to the effect that the exemption statutes may be stricken down by federal law but here we have a property right that is created by a person who is long since gone. [146]

The Court: Well, that's true of a spendthrift trust. That's this case. It bothered me for a while until I got my eye on the restatement, that the United States can't reach a greater interest in the trust than the beneficiary owns, but apparently the United States can. That's the American Law Institute restatement.

Mr. DeLew: I don't think it goes into this except in a general sense. It makes those statements but the cases that they base those remarks upon, they are not cases such as this.

The Court: But the restatement is broad enough to cover this one. I am going to stand on the restatement. I think I shall hold that 157, as amended in 1947, the American Law Institute restatement, applies here. The fact that there is a spendthrift trust will not avail the beneficiary, nor the bank, for that matter, standing alone.

The judgment in this case as between Leuschner and the United States on the original complaint will be for the United States. That is to say, my ruling specifically is it doesn't make any difference

whether there is a spendthrift trust involved because of section 157 of the restatement as amended in 1947.

Secondly, I think that the notice, which was addressed to the bank, notice of levy which was addressed to the bank, satisfies the statute, and particularly it satisfies that provision [147] of Section 6331(B) which says the term levy used in this title includes the power of distraint and seizure by any means.

Now, Congress has made that very broad and I feel strongly about that because there are analogies in the law of trusts of the sort. For example, the law of trusts to the effect that as between successive assignees of a beneficial interest that one prevails and has priority who first notifies the trustee. That's a sort of a seizure or taking possession of the beneficial interest.

Now, I think the statute is broad enough to enable the United States by a notice of the kind given the bank in this case to take that property.

Now, thirdly, I am prepared to rule that the service of the notice of levy upon the trust officer of the bank, which was one of the trustees, suffices in the circumstances of this case, where that bank held the assets, the bulk of the estate being securities which were in the vaults of the bank and money which was in the bank's commercial deposits. I believe that takes care of the thing.

Mr. DeLew: How about the bankruptcy, Judge?

The Court: Yes, I am prepared to rule on that. I think on that I would like to look at the brief you

didn't want to let in and I may let that in. Let me see that photostatic copy of the brief. We may get some help out of that. [148]

Mr. Dealy: All right, your Honor. We will have no objection to letting it in, your Honor.

The Court: Mark it as an exhibit before I read it.

Mr. Dealy: Anything that can be of help.

The Court: Well, I don't know if it is going to be helpful or not, but let's see what it says. I think it is receivable, I think it is admissible here on the basis that this will tend to show whether or not the issue was raised between the same parties down in the bankruptcy court. I think it's admissible on that basis and will be received.

The Clerk: Plaintiff's Exhibit D in evidence.

(The brief referred to was admitted into evidence as Plaintiff's Exhibit D.)

The Court: All right, I will read it. You don't need to take this down, Mr. Reporter. Any parts of it I read you don't need to take down.

(Reading by the Court.)

The Court: Well, I can see why the referee in bankruptcy turned this down. The thing you are up against here, I will let you argue it to me, but I suggest to you, Counsel, the thing you are up against here is you have a very different question in the bankruptcy proceeding than you have here. You have a construction of that provision of the Chandler Act which was in the prior bankruptcy laws, too, which answers the question what property passes to the trustee, and the answer [149] is

such property that the bankrupt could by any means have transferred before the petition or after the time of the petition, and I can well understand that the referee might and perhaps should hold in this case that the spendthrift trust provision being in that instrument the beneficiary was under an incapacity to transfer which prevents the property passing to a trustee in bankruptcy.

Then there is another consideration, too. That spendthrift trust provision is available to the beneficiary against creditors generally in this bankruptcy proceeding, it isn't available, the holding here against the United States, and it isn't available against his dependants and his divorced wife, and there are others, other exceptional cases, but the spendthrift trust provision is available against creditors generally. So, in a bankruptcy proceeding where the trustee is taking his interest for creditors generally, you have a different question.

Mr. DeLew: No, you don't Judge.

The Court: Why don't you?

Mr. DeLew: Let me point this up to you, if I may. The spendthrift provisions insofar as the general creditors are concerned are only available to the beneficiary to the extent of the amount necessary for his support. Any amount in excess of that—let's take an example.

The Court: You don't need to argue that again. We have [150] been through that several times. I understand the California Code. Under the California Code his creditors can reach anything that isn't necessary for his support. I understand that.

Mr. DeLew: By the same token, the referee couldn't reach that.

The Court: Yes, for the general creditors.

Mr. DeLew: Yes.

The Court: Beyond the necessities for support. But in this case we are taking that support away from him, too. That's the difference between the bankruptcy proceeding and this one.

Mr. DeLew: Yes, but in this proceeding, in the bankruptcy proceeding, the government had a priority claim. They already had a claim against him.

The Court: Yes, but the referee in bankruptcy was not deciding the issues we have here this morning.

Mr. DeLew: Well, the trustee is a representative of all the creditors, Judge, what can we think of that if a representative——

The Court: All he decided was that he wouldn't take this asset for the benefit of the creditors, all the creditors.

Mr. DeLew: Including the United States.

The Court: Well, he didn't take it for the United States, he didn't take it for anybody else. But that's like Cert. denies, he doesn't decide the question that is before him, namely, denied Cert., the Supreme Court says. All the referee was [151] saying is we won't take that asset, and the reason was that it didn't fall within the bankruptcy act and language that it was property which the trustee—which the bankrupt might by any means have transferred. That's what we are talking about here.

Now, I think I want to talk to the bank a little

bit this morning about that. I believe it would serve no useful purpose to pursue it further. With respect to your point that this matter has been settled by an adjudication in the Southern District of California by the referee in bankruptcy there, the Court takes the position that the referee's conclusions and decision down there were concerned with a different issue than is presented to us here. The issue there was whether this was property which Mr. Leuschner might by any means have transferred prior to the filing, or at the time of filing of the petition in bankruptcy.

So in the action pending here this morning between Leuschner, the plaintiff, against the United States of America, the defendant, the judgment will be for the United States, and will you prepare findings of fact and conclusions of law and the judgment in that matter.

Mr. Dealy: We will, your Honor.

The Court: Now, the United States has filed an answer and a counter claim — which is it, a cross complaint or a counter claim? [152]

Mr. Jenks: Cross-complaint, your Honor. This started as a State action.

The Court: I see. The United States has filed a cross-complaint against the bank.

Mr. Jenks: No, let's put it this way: The bank filed, interpleaded the United States.

The Court: That's right.

Mr. Jenks: And the United States answered that cross-complaint.

The Court: How did the bank get in here?

Mr. Jenks: Mr. Leuschner, the taxpayer, sued the bank.

The Court: That's right.

Mr. Jenks: And the other co-trustee.

The Court: I see.

Mr. Jenks: The bank, under the State interpleader statute then cross-complained against the United States and the other co-trustee.

The Court: I see. All right. Now, I want to talk to you about the bank's cross-complaint in this case.

Mr. Jenks: Well, the bank's cross-complaint is merely the usual interpleader pleading. I think it has already been held here by Judge Murphy, when he refused to dismiss it, that it was proper for the bank to cross-complain against the United States.

The Court: Yes. [153]

Mr. Jenks: Judge Murphy did that on the authority of a New York District Court case which was not taken to the Circuit Court, as far as I know, and I think Government counsel will agree with me, this question has not been decided by any circuit court.

The Government counsel feels when the stakeholder is sued, as the bank was, that the United States has not consented to be sued. However, as I said, the circuits have not yet spoken. Judge Murphy here, by denying the Government's Motion to Dismiss has said yes, that this statute—I forget whether it is 2310 or 2410.

Mr. Dealy: 2410.

Mr. Jenks: 2410 covers that situation.

The Court: So that already has been decided.

Mr. Jenks: Judge Murphy refused to dismiss the cross-complaint.

The Court: I see. Well, I won't have to review that. Now, the Government claims that the bank is liable.

Mr. Jenks: That is correct.

The Court: That's what I want to talk to you about. I think I'll let the Government bear the burden on this, because my impressions at this point are that the bank ought not to be liable for any penalty in a case like this.

Mr. Jenks: In that connection, your Honor, I might make one observation before the Government replies. We also feel that the notice of levy was defective. However, for our purpose, except the penalty, that is immaterial. The notice of levy, even if defective as a seizure gave the bank actual notice of lien, even if it didn't seize anything, and once the bank got notice of the lien, the bank couldn't pay except at its peril.

The Court: That's right.

Mr. Dealy: Your Honor, our view on this penalty action is simply this: that under Sections 6332(a) and (b) of the 1954 Code, which your Honor was reading this morning, Congress took a, perhaps you might call it, a funnel view.

The Court: A what?

Mr. Dealy: A funnel view, that here you have a number of people with interest in a particular sum of money or a particular bit of property and rather than have to run all over the lot gathering in the

thing, they gave the District Director, the Commissioner of the Internal Revenue Service, this right to come down to the end of the funnel to the person in possession of, or the obligation with respect to property or rights to property, subject to levy. In other words, it got down to that last person, and in most of our cases it is either the bank or an insurance company. The idea was that that last individual, a levy can be made on them and we, by that means, can seize the property as it comes through the funnel and we've got payment. [155]

The Court: What you are asking me to do is to give you a judgment against the bank in the amount of the value of the property and assets which it has failed to turn over to the United States up to this time.

Now, you're talking about a case involving some nice questions of law, as we have discussed them here, where the bank was confronted with those questions in the law suit by Leuschner against the bank, with the United States on the one hand and Leuschner on the other and the bank in the middle.

Now, whatever it does, it is going to be acting at its peril after your notice. It's sued by Leuschner, the beneficiary of the trust, and it has been noticed by the United States Treasury Department, so whatever it does it is going to be acting at its peril.

Now, do you think Congress meant that in a situation where there is a genuine doubt about the United States' right to take this property as against Leuschner, do you think that where there is that genuine doubt and where the bank is acting in good

faith and where if it acts one way or the other it's acting at its peril, do you think that the Congress of the United States meant that the United States District Court should forthwith give you a judgment or a penalty in the amount of the whole amount of the trust property?

Mr. Dealy: Well, admittedly, if your Honor please, in this case we have a more difficult situation insofar as [156] the action of Mr. Leuschner was filed before our action was filed?

The Court: Right.

Mr. Dealy: So admittedly we have a more difficult situation. But we feel that there are decisions which hold, we have them cited here in our memorandum in the file, that the defendant, the bank, faced no double liability for compliance with the levy even though other parties may have claimed the fund. This language is from *United States vs. Hewland*, a Fourth Circuit case, which says as follows: "Payments to the Government pursuant to the levy and notice is a complete defense of the debtor against any action brought against him on account of the debts."

The Court: No, nothing like that in this case. Leuschner has already sued the bank. Leuschner has sued the bank and he says, "Turn over my property to me," and then you fellows levy on it.

Mr. Jenks: The levy was prior to the suit, your Honor.

The Court: Yes. The final demand was subsequent to it.

Mr. Jenks: Yes.

The Court: Now, Leuschner says, "I am a beneficiary of the spendthrift trust. You fellows can't take this interest for that claim."

Mr. Dealy: Your Honor, in response to that we have here [157] a statement in our memorandum that the fact that the property due the taxpayer may be the proceeds of a spendthrift trust does not in any way prevent the seizure thereof of the United States, and we cite Rosenberg and the other decisions.

The Court: Of course, I am going along with that finally, but the bank was confronted with this litigation to find out what the answer was. How is the bank going to know what the answer is in California, in the Ninth Circuit, finally maybe before the Supreme Court of the United States.

Mr. Dealy: Admittedly we haven't got any Supreme Court cases on that; we have only the Southern District case in California.

The Court: Well, you have another one this morning, right here, as far as the taxpayer is concerned.

But what we are talking about is a very different thing. Here's a stakeholder, the bank. It has no interest which way this litigation goes. I don't care whether Leuschner wins or whether you win. But here's the predicament they are in. Leuschner is suing them for his money and you've levied on it, on the tax claim due by Leuschner and how's the bank going to turn that over to you without running the hazard that some court's going to say, "Well, this American Law Institute, paragraph

157, doesn't apply here in California in view of the statute about support, one thing and another. It seems to me that the bank is placed in a most hazardous [158] position. These problems are not without difficulty. Now, it's not open and shut.

Mr. Dealy: We have had some difficulty over this one ourselves.

The Court: Yes, of course. Well, do you think that Congress meant—I am talking about Congressional intent now—do you think that Congress meant, when they enacted Section 6332 of Title 26, do you think Congress meant that a bank should be subjected to penalty, the full amount of the value of the assets it fails to turn over to the Government in a situation like this?

Mr. Dealy: Of course, your Honor recognizes the fact that we are not seeking a double payment by any means. We [159] are only seeking one payment.

The Court: Yes, but suppose you can't get it out of Leuschner. I give you judgment against Leuschner, I have already done that this morning.

Mr. Dealy: Yes, your Honor.

The Court: All right, you can't get blood out of a turnip. I don't know what his situation is. So you can't satisfy that claim out of Leuschner. What you want to do is satisfy it out of the bank.

Mr. Dealy: First we want to satisfy it out of the assets.

The Court: I suggest to you I don't believe Congress meant that the bank should be allowed 100 per cent. Now, [159] what have you lost by reason of

the bank's action? The bank hasn't turned a dime over to Leuschner. You haven't lost a dime. The money and property is still down there. Now, you have some remedies; you can forego that lien. I'm going to hold something presently about that. I don't think you are doing it here.

Mr. Dealy: Is your Honor giving us a judgment? Is it my understanding we are getting a judgment for the amount now held by the bank which Mr. Leuschner sued to recover?

Mr. Jenks: I didn't understand the United States was getting any judgment in either case.

The Court: Well, what I am doing is holding that Leuschner fails in his action against the United States.

Mr. Jenks: Against the bank.

The Court: I mean against the bank.

Mr. Jenks: Which the United States has cross-complained, is a cross-defendant.

The Court: Yes. Leuschner fails in his action against the bank, and will you prepare findings? You should prepare those. I asked you to, counsel, but I was mistaken. The bank should prepare findings and conclusions and the judgment in that matter, in the Leuschner-bank litigation.

Mr. Troxel: And is the Court also holding that Leuschner fails in his action against the individual trustee?

Mr. Jenks: Well, she is also a defendant. [160]

The Court: Certainly. You represent the individual trustee?

Mr. Troxel: Yes.

The Court: Well, will you cooperate in the preparation of those findings and conclusions and judgment?

Now, then, so far as the Government's alleged suit to foreclose the lien is concerned, it didn't perform it, hasn't any pleadings.

Mr. Dealy: Your Honor, you have in the interpleader action when we were brought into the action, and it was asked that we state our claim, we did request the Court in that answer, as an affirmative defense, to direct the bank to pay over the fund which they say they can't determine who to pay it over to. As a result of our levy we asked that they be directed to pay that over to us. Now, insofar as you have held that the levy is valid between Mr. Leuschner and the United States——

Mr. Jenks: Counsel, I think the trouble with that is it raises a question I don't think is actually at issue here. On the date of the levy there was nothing payable to Leuschner. On the date that the bank filed its cross-complaint bringing the Government in, there was a certain sum payable.

The Court: I'm not talking about that, I am going to take your argument up point by point with respect to that. Maybe that's what we should do first before we talk about [161] what the Government's going to come up here with.

So far as the bank is concerned, I am going to take the position that it is not liable to the Government under this penalty provision for anything, and I'm doing that on the basis that there was no money then due at the time of this levy. And I'm

doing it on the basis of the proposition that a fellow had to live to the end of the month to have anything due him. There wasn't anything then due at the time of this levy, wasn't anything owing and the bank owed no obligation to pay it.

But even if there were something then due, I take the position that the Congressional intent does not go so far as to impose this penalty upon the bank under the circumstances of this case where there are genuine and real and serious issues of law as to whether the bank should pay the money to Leuschner, the beneficiary, or the United States, the tax claimant. Now, I believe that's enough. You had some other points.

Mr. Jenks: I think that means I will prepare the findings and conclusions of law and judgment in that matter also.

The Court: I think you should.

Mr. Jenks: And then we will come back to our little tail end of attorneys' fees and costs.

The Court: Yes, I am going to allow you the attorneys' [162] fees as you claim.

Mr. Jenks: That would be \$3,500.00 for the bank, and I believe yours was \$500.00, wasn't it?

The Court: I think that's modest enough.

Mr. Jenks: Thank you.

The Court: In a matter of this kind.

Now, so far as the United States is concerned, I suppose that takes care of everything.

Mr. Dealy: Well, your Honor, we still have in the action the claim in this answer to get the funds. I believe that that request to get the funds which

the bank admits that it holds and wishes to pay over to somebody, that we are entitled to receive the funds.

The Court: Whether the levy was good or not.

Mr. Dealy: Well, your Honor, I believe, has held today that the levy was a good levy.

The Court: Well, it's a good levy.

Mr. Dealy: The thing I am trying to get at, does your Honor desire that we go down with another levy now?

Mr. Jenks: As I understand it, Mr. Dealy, see if I am wrong about it, your Honor held that these funds are subject to the Government's lien, that however your right to obtain them today has not been properly pleaded. You cannot foreclose your lien. So as I see it, what you will do, after the judgment and conclusions are filed here, and assuming [163] there is no appeal that prevents it, you will then bring an action to foreclose the lien on such sums of money which the bank is then holding. Once you give us notice of that levy we aren't paying——

Mr. Dealy: Well, I think I can serve the levy again immediately.

The Court: Well, I am not intimating any suggestion about that.

Mr. Dealy: But your Honor, I believe we do have in the pleadings all the essentials for the foreclosure of the lien. We have pleaded the lien and we have pleaded everything else.

The Court: Now, I examined that, I looked at

your pleadings yesterday. I don't believe you have an action here to foreclose the lien.

Mr. Dealy: All right.

The Court: I am going to take that position, that it isn't pleaded, you come in the back door, even with our notice pleading; you must at least have a document that purports to proceed against Leuschner here. Your answer was simply a response to the bank's counter-claim—cross-complaint.

Now, is there anything about which anyone is unsure? You folks prepare the findings and conclusions in question.

Mr. Jenks: Yes, your Honor.

The Court: How much time do you want to do that? [164]

Mr. Jenks: I think one problem is submitting them to Mr. Dealy ahead of time, not knowing—maybe he doesn't know where he is going to be. I think I could have them ready to give to opposing counsel Tuesday night anyway, or Wednesday.

Mr. Dealy: I think, your Honor, in view of my impending travel status at the moment, I think we had better have the findings of fact and conclusions of law submitted to the United States Attorney's office here.

Mr. Jenks: Yes, to Mr. Gillard.

Mr. Dealy: And then I believe Mr. Munter and Mr. Gillard will go over them rather than try to catch up with me.

Mr. Jenks: You will be here all of next week, your Honor?

The Court: I will be here all month. [165]

SETTLEMENT OF FINDINGS

March 28, 1957, 10:00 o'clock a.m.

The Clerk: Leuschner vs. The First Western Bank and Trust Company; United States vs. First Western Bank and Trust Company, settlement of findings.

Mr. Jenks: Ready, your Honor. Mr. Troxel, who represents the sister and other trustees, Mrs. Reichert, I believe informed the Court he had a previous engagement in the State court which he couldn't postpone and which prevented him from being here at ten. He stated to me and I believe to the Court that he will abide by any decisions of which the bank counsel makes.

The Court: Well, what I have to discuss with you doesn't concern him too much.

I seem to recall that in your opening statement, counsel, you're counsel for the First Western Bank.

Mr. Jenks: That is right.

The Court: You said this is an interpleader proceeding and ready to tender the money into court and abide by the results. Now, if that's the case, and I thought we'd examine the pleadings here together this morning, if that were necessary, for the purpose of determining precisely what is the situation.

Now, the thing I had in mind is this: If I sign the findings and conclusions and judgments as you have prepared them, the United States is going to be proceeding against you to get that money, and we'll have another proceeding here. I [168] would

like to settle this all up in one proceeding, so we don't have two proceedings.

If this is properly to be regarded as a bill of interpleader, that is to say, if your pleading is to be regarded as a bill of interpleader, then I think we ought to treat it that way in the findings and conclusions and judgment; that is to say, I think the United States should have its judgment against you for the money in this proceeding.

I am perfectly clear that Leuschner cannot recover against the First Western Bank, and I am perfectly clear that the United States cannot recover against the First Western Bank for the penalty under the statute, and those matters are decided. I am not having you here this morning for the purpose of reviewing those rulings at all. I think we are here to discuss and to clear up for me the interpleader matter. That's what I had in mind.

Mr. Jenks: All right, your Honor. The State court action brought by Mr. Leuschner, and under the State court rules and Federal decisions, as we understand them, permitted us to file a cross-complaint in interpleader, which we did do. That is in the original State court action, Leuschner vs. The First Western.

In that cross-complaint we offered to tender, and as I stated to you, we are still willing to. It seems to me that when your Honor rendered your decision that Leuschner was as plaintiff in the State court was not entitled, that the [169] interpleader fell with that decision, particularly when your Honor said—you will recall the Government's an-

swer to the bank's cross-complaint, had a prayer for foreclosure, and Your Honor ruled inasmuch as that was only an answer to our cross-complaint and not an affirmative pleading to foreclose, that they could not, in that interpleader action, foreclose the lien.

Now, I have been assuming that the United States would come in with one of two things; a new notice of levy, which will catch whatever funds we then have, less the attorney's fees, plus whatever funds might become payable prior to the notice of levy.

The Court: There isn't any sense in requiring the United States to go through any more proceedings.

Mr. Jenks: There is one other gesture, your Honor, I think they will have to go through, if I understand their theory. They claim that they have a right not only to money as it becomes due, but a present right to Leuschner's future beneficial interest.

Now, it seems to me that the only way they could do that is by foreclosing their lien.

The Court: What money did you offer to tender into court?

Mr. Jenks: I offered to tender into court the money which we—as it became due.

The Court: The installments of the income.

Mr. Jenks: That is right, less the attorney's fees and [170] expenses of the trust.

The Court: Yes. What do you say about this, counsel?

Mr. Munter: Your Honor,—

The Court: I haven't heard anything from the United States Attorney. I developed this idea on my own motion.

Mr. Munter: We were brought into the original action under Section 2410 of Title 28, which is the only way that jurisdiction could be obtained over the United States.

The Court: What section is that?

Mr. Munter: Section 2410 of Title 28.

The Court: I know, but tell me what it is.

Mr. Munter: It provides for an action to quiet title or for the foreclosure of a mortgage.

The Court: Yes.

Mr. Munter: Where the United States claims a lien on the property. It provided in that section that in any case where the debt owing the United States is due, the United States may ask by way of affirmative relief for the foreclosure of its own lien.

The Court: The trouble is you didn't do it.

Mr. Munter: We didn't file a separate affirmative pleading, but we did ask by way of affirmative relief to realize the money on our liens. We didn't use the word—

The Court: Why don't you get your pleadings and read to me what you did. Let's get our eye on it.

What's your whole pleading, now? This is an answer, really, [171] isn't it?

Mr. Munter: This is the answer to the cross-complaint filed by the First Western Bank and

Trust Company, which was a cross-complaint in interpleader.

The Court: Yes. All right. Now, read that answer to me. How long is it?

Mr. Munter: Well, it's three and a quarter pages.

The Court: Well, read it to me. Let's see what it says. That is to say, you can leave out the formal things.

Mr. Munter: We have admitted various allegations here.

The Court: You have some admissions and you have some denials; right?

Mr. Munter: Right. As a third separate and affirmative defense we pleaded that all right, title and interest of Richard D. Leuschner in and to any property of any sort, including any trust or any proceeds thereof, is subject to the tax liens of the United States based upon assessments duly made for the income taxes for the years 1943, 1944, 1945 and 1947, as follows: —then we set out each assessment with the date the assessment list was received, and the amount. The amount is approximately \$200,000.

We then alleged the amounts, although duly demanded are unpaid. We then set forth notices of tax liens were duly filed in San Francisco County on June 23, 1952, covering the first three years referred to above, and on September 19, 1952, [172] covering the last year referred to above, and in Merced County, California, on July 21, 1952, cover-

ing the first three years, and on September 24, 1952, covering the last year.

Then our prayer is as follows: Wherefore the defendant prays; 1, that the complaint herein be dismissed; 2, in the alternative, in the event it is determined that the court has jurisdiction, that all moneys or other property of Richard D. Leuschner from the trust herein or held by or in the control of any other party, be ordered paid over to the United States of America pursuant to the tax liens.

3, that the interest of Richard D. Leuschner in the trust herein to the extent of the tax liens be declared to be payable to the United States of America and that the trustees of the trust herein be ordered to pay all payments and distributions under the trust as would have gone to Richard D. Leuschner to the United States of America until the amounts outstanding on of its means are fully paid, and for such other relief as may be proper.

Thus we affirmatively pleaded our liens and we asked that the money be paid to us under those liens. We didn't use the word "foreclosure."

The Court: Mr. Clerk, will you find this document he is reading in our file, please?

Mr. Jenks: The portion that he is reading is the last page, page 3; starts just at the bottom of page 2. [173]

The Court: Let's see what it says.

Well, to start out with, you don't need — you won't need to find that, I have the bank's copy.

To start out with, the document is entitled "Answer to the Third Party Complaint."

Mr. Jenks: It is the cross-complaint. Did I turn to the wrong one, your Honor? It is the same language, one is the third party complaint. Right under it. There it is.

The Court: Thank you. Answer of the United States of America to cross-complaint.

Mr. Munter: And that is the cross-complaint in interpleader brought by the bank.

The Court: This is a funny pleading, any way you want to look at it. Here's a thing called the first separate and affirmative defense. Listen to what is said there. The complaint fails to state a claim against the defendant the United States of America for which relief can be granted. That's simply a demurrer. That's no first separate and affirmative defense at all.

Mr. Munter: Well, if your Honor please,—

The Court: Don't argue now with me about that one. This is an inept pleading, any way you want to look at it. I don't know who drew it. Did you draw it?

Mr. Munter: No, Judge, I did not. I'll defend it.

The Court: We ought to have him in here to defend what he [174] has done. Second separate and affirmative defense. The United States has not consented to be sued in this form of action and therefore the court lacks jurisdiction over the United States as a defendant.

Third separate and affirmative defense. Leuschner's interest subject to tax lien.

Now, where is there anything at all in this plead-

ing that says you are foreclosing, seeking to foreclose?

Mr. Munter: We set out earlier the facts as to the basis on which we acquired the lien on the interest of Mr. Leuschner.

The Court: Yes, what you say is this interest, all of his interest is subject to the tax liens of the United States. That's what you say, boiled down that is all you say.

Mr. Munter: Right, but we do give the facts that gave rise to the lien.

The Court: Well, the assessment list and so on, I don't see that helps you out very much.

Mr. Munter: Well, there we have the facts as to the lien. Then we ask that the money be paid to us under the lien. If we had to use—remember, we are speaking of money here.

The Court: How are you going to be entitled to the principal of this trust fund—that is what you want to reach? You are not concerned alone with the installment payments of income, you are concerned in addition in reaching the corpus of the trust.

Mr. Munter: No, Judge, we only take the position that as [175] moneys become payable to Leuschner that we are entitled to them.

The Court: Oh, you don't go after the principal now?

Mr. Munter: No, Judge.

Mr. DeLew: May I ask the Government whether they are asking for a receiver on this thing as well as foreclosure?

Mr. Munter: No, Judge, we are not.

The Court: You're not asking for foreclosure either. Where, in here, do you ask for foreclosure?

Mr. Munter: Well, it's true we don't use the technical word.

The Court: Well, it isn't just technical. Let's find some substance in here of anything that has any relationship to this proposition.

Mr. Munter: We ask that under the lien the money be paid to us. Now, if we had to use the word "foreclosure," that is what exactly would have happened under our lien, by virtue of our lien, the money would have been paid to us, our lien rights would have been held to be sufficient to have money paid to us, being superior to any interest of Mr. Leuschner's. You must keep in mind, it seems to me, that the bank comes in and says, here is the money, Leuschner is claiming it and the United States is claiming it. We show that our claim to it is based upon these liens. Under those circumstances the court has recognized our liens were superior to the interest of Leuschner.

The Court: Well, not only recognize them, but I am giving [176] you a judgment to that effect, before we get through here. I don't think there is any question about Leuschner's interest being subordinate to the tax claim of the United States. That's perfectly clear.

Mr. Munter: The bank has disclaimed any interest in the fund, I believe the matter is between Leuschner and us, and ask the money be paid to us. The bank admittedly has no right to it.

Mr. Jenks: Yes, we admit, as a stakeholder, we have no interest in the present funds, but I don't think that unless there is a foreclosure that the judge could possibly render a judgment against us saying that from here on if Leuschner continues to be alive at the end of each month we pay it to the United States. I don't think that can be a proper judgment. I think if you want to foreclose the beneficial interest there should be a foreclosure action. I think if you want it, the judge is right in suggesting that as part of the interpleader action the United States have judgment for the present fund less the attorney's fees and costs of the administration.

Mr. Munter: Under your theory we couldn't have any more than was due at the time you filed your pleading.

Mr. Jenks: No, I think in an interpleader action, Mr. Munter, until the money is deposited the stakeholder hasn't stepped out of the case, so I think that as long as the stakeholder has not stepped out that there can be a proper judgment ordering the stakeholder to pay to the successful [177] litigant the amount the stakeholder has as of the date of the judgment.

Mr. DeLew: Would your Honor be kind enough to listen to counsel for Mr. Leuschner in the matter?

The Court: It depends upon what counsel for Mr. Leuschner wants to say. If you want to re-argue the proposition of Leuschner to prevail against the Government, no, I don't want to hear

anything about that, because I am perfectly clear on that.

Mr. DeLew: Well, if your Honor please, I was directing my thoughts to the present trying to assist the Court.

The Court: Good.

Mr. DeLew: In helping out in this situation. It was my view that the Court took the position that at the time of the attempted levy there was no actual sum due to Mr. Leuschner. I am not speaking about the lien, now, Judge, speaking about the time of the attempted levy. There was no fund due Mr. Leuschner at that time.

The Court: Yes.

Mr. DeLew: Now, if that's true, then——

The Court: The levy was no good.

Mr. DeLew: Yes. If that is true, then we must consider that there are only two ways the Government can take this money, either through its levy and seizure process, or through an action to foreclose. [178]

Now, if at the time the attempted levy was made there was no money there, then that falls. Your Honor has already ruled that way.

The Court: That's right.

Mr. DeLew: All right. Then the only other way that the Government can get it is either following the bank's counsel's thought of a new lien or foreclosure. Now, counsel can't argue this is a foreclosure; he can't do it.

Now, then, he goes one step farther. Perhaps, if I read his mind artistically, he then says we want

the money paid by the trust to the Government. He is at that point asking for a receiver. Who will give the bank a receipt for the money? Not the president. Who gives, under the trust—the bank has got to have a receipt for this money, somebody has to be authorized to give them that receipt.

The Court: I wouldn't have any trouble about that.

Mr. DeLew: Maybe you wouldn't, Judge.

The Court: The State Director of the Bureau of Internal Revenue would give them a receipt right quick.

Mr. DeLew: Well, I don't know.

The Court: Of course he would, or the collector. I don't know whether the collector is under the director any more.

Mr. Munter: It is the District Director they use now.

The Court: Yes, District Director. I am not worried about that. [179]

Mr. DeLew: But if the money isn't due, it wasn't due at the time of the levy, I don't see how any judgment can be given attacking that particular levy, or driving at that fund.

Now, if counsel for the Government wishes to foreclose, and, your Honor, when Mr. Dealy asked your Honor that very point, you said that you weren't giving him a suggestion——

The Court: Wasn't what?

Mr. DeLew: That you didn't intend to give him any advice on it, he would have to look to his own resources as to the matter.

The Court: The trouble we were presented with at the hearing of this case was, I found out later, that Mr. Dealy is a trial lawyer for the Government, he goes around putting the evidence on in these cases and he doesn't know a blamed thing about the research or the law. Somebody else back in Washington has got out the law, and the first thing that Mr. Dealy said to the Court was, now I am here to put the evidence on and I request your Honor give us some time to file briefs or a memorandum, and I said I don't think we are going to have any briefs or memorandum, we will decide the case here.

That presented Mr. Dealy with a problem, he hadn't researched this case and he hadn't had the benefit of the fellows who had researched the case. So here we are with a fellow whose job it is to get the evidence on. I don't know how a man can put the evidence on properly if he doesn't know [180] anything about the legal principles that control the case. But that is the way the Government is proceeding. He went from here to Texas and from Texas to Oklahoma, some place, trying lawsuits, trying them in this fashion, and the boys back on the desk in Washington expect to file memoranda in this case. In this case they are going to have to file in the Circuit. I am not interested in that. When they come out to try a lawsuit they ought to try a lawsuit, ought to be able to prepare for trial and submit the authorities, argue the authorities. The Court dug out the authorities for Mr. Dealy in this case.

Mr. DeLew: Unfortunately.

The Court: I beg your pardon?

Mr. DeLew: Unfortunately.

The Court: Well, it satisfied myself. Mr. Dealy didn't know anything about those authorities at all. It hadn't occurred to him, didn't know the point of law.

Now, that seems to me to be a poor way for the Government to be trying these cases, but be that as it may, we are here again, you fellows in the District Attorney's Office, Mr. Dealy isn't here, you fellows in the District Attorney's Office, I don't suppose you have done any thinking about this since the decision.

Mr. Munter: I assure your Honor we have.

The Court: What have been your thoughts?

Mr. Munter: Well, I sat down and very carefully analyzed [181] this and the complete answer to Mr. DeLew is this: That he is confusing the two actions. Your Honor has held that in our action, the United States versus the bank, that we are not entitled to the penalty. All right, that's settled. Now, we have an entirely separate action that has nothing to do with the levy. We can drop that word completely, and that is the action of Leuschner versus First Western Bank in which First Western Bank then cross-complained against the United States, filed an interpleader. They said, "We don't want the money, it either goes to Leuschner or to the United States." In that action we are claiming on our lien under Section 2410. We permitted to ask, by way of affirmative relief, for the foreclosure.

The Court: Oh, well, you didn't do it. I didn't think you had done it at that time and I asked you to come in again so I could review my determination about that. I don't see any place in this document where you talk about foreclosing a lien at all.

Now, if you intended in the first place—it is very unartfully drawn, this thing, any way you want to look at it. All this is affirmative and separate defense, first separate and affirmative defense. Well, it isn't an affirmative defense.

Mr. Munter: Then, your Honor, I would ask, by way of permitting——

The Court: As a matter of fact, every one of these [182] things you call an affirmative defense and affirmative defense and affirmative defense—well, when you have an affirmative defense, it's defensive, it isn't a pleading which asks for affirmative relief.

Mr. Munter: Well, if your Honor please, by way of complete settlement of this, and I am sure there will be no prejudice to any party in view of the lengthy arguments, could we amend our answer?

The Court: Well, you are up against the fact that I think your levy was void.

Mr. Munter: Another thing, Judge, the levy is not in this action. We lost on the levy in the United States versus First Western Bank. This action that we are now discussing on the pleading here is in the action of—this is the cross-complaint and interpleader filed by the First Western Bank and Trust Company. We are not claiming

anything under our levy in this action, merely asserting our lien rights.

Mr. Jenks: It seems to me, your Honor, there is nothing to amend in the answer, as I see it. I agree with your Honor on it, I think I understood you. If you are seeking affirmative relief as opposed to affirmative defense, then the United States here should have filed a cross-complaint seeking affirmative relief against the trustees and Mr. Leuschner, i.e., please foreclose our lien, and then the Court can come out with a decree of foreclosure.

The Court: I don't know whether you are trying to foreclose a claim upon the income only or whether you are trying also to foreclose your claim upon the corpus of the trust. Now, there isn't anything in this pleading that indicates one way or the other about this. As a matter of fact, if you're talking about a foreclosure, it just isn't here.

Now, we take great liberties, of course, nowadays with our notice pleadings. Was there anything in the pretrial conference order, or did you have issues framed?

Mr. Jenks: No pretrial conference order, no.

The Court: No. Now, nobody anywhere started talking about foreclosure in the pleadings or in the pretrial conference order framing issues. Here we get into the lawsuit and then we find out what we have here, we find out at the trial that this is a foreclosure trial. We take a look at the pleadings to see what is there, and there isn't any foreclosure there, as far as I can tell.

Mr. Munter: We asked for the money based on our lien, we said our lien entitles us to have the money. Now, the only thing we left out is the word "foreclosure." I don't know what else there could be.

The Court: No, it isn't.

Mr. DeLew: The lien doesn't necessarily apply, you have the right to have the money——

Mr. Jenks: I don't think the lien entitles you to the [184] money, I think the lien prohibits us from giving it to Mr. Leuschner.

Mr. Munter: Well, I would disagree on that.

The Court: I don't see any point in arguing that. Now, the thing that interests me further is still not settled, about the interpleader. If you come in and say the bank is prepared to turn over the installments of income when and if they become due.

Mr. Jenks: Up to the date that we deposit the money on the judgment, yes, your Honor, but I don't think that in this action without the foreclosure that there can be a valid judgment looking toward the fund. The theory of interpleader, as I understand it, is the stakeholder at a point puts the money on the table, gets a judgment releasing it.

The Court: I think that's right.

Mr. DeLew: But in this case, Judge, if the Government levy is invalid, not sufficient, there is nothing for the bank to put in court.

Mr. Munter: Of course there is. They have the money.

Mr. DeLew: There is nothing to put in court.

Mr. Munter: They have the money and they are advised of our lien. Regardless of what we say about the levy, we can throw that out the window, for the purpose of this argument.

Mr. DeLew: Judge, a lien is a security, it does not require that the security be brought in before this court in an [185] interpleader.

The Court: If what you say is true, counsel, you would never have a foreclosure of any kind anywhere, wouldn't need one, because all you would have to do is come in and say we claim the money, let's have it.

Mr. Munter: The normal foreclosure envisions the sale of property and a division of the proceeds to the various liens. Now, here we are dealing with money.

Mr. DeLew: Not dealing with money.

Mr. Munter: Then obviously—excuse me. Go ahead.

Mr. DeLew: You finish, please, I am sorry.

Mr. Munter: We are dealing with money and the bank came in and interpleaded the sum of money; then there can be no sale, it is just a straight application of that money to the people that are entitled to it under the lien claims.

The Court: What is the offer you make in your pleading, now?

Mr. Jenks: To deposit the money in the court.

The Court: What money?

Mr. Jenks: The fund, I think, as I recall it, your Honor, and I am quite sure I am accurate,

deposit the sum we now have and such other sums as may become payable.

The Court: Find it for me. What I would like to do is clean this thing up in this proceeding, if we can. I am endeavoring to do it, but the Government hasn't given me much [186] to work with.

Mr. DeLew: I don't think the pleadings here are such that you can, Judge.

The Court: Well, I may not be able to.

Mr. Jenks: I think the most you can do, your Honor, is to clean up the present fund less attorney's fees and administration; that's the most you can do. And I think that you would agree that in this you cannot order the payments in the future from it.

The Court: I agree to that.

Mr. DeLew: If your Honor please, in the memorandum of objections to findings that the Government filed in this matter they are suggesting that what they are looking to here is the 40 per cent interest, or whatever the interest is that Leuschner has. Now, that is not something that can be brought into this court at all.

The Court: No, certainly not.

Mr. DeLew: When I interrupted Mr. Munter, which I shouldn't have done, what I had in mind, it jumped out, was he suggested a sale, that we are dealing with money. The money that has accrued since this action is only one of the phases. The Government is reaching into the trust for Leuschner's interest. That is subject to a sale.

The Court: Well, the Government ought not to

be proceeding piecemeal about this anyway. If Leuschner has any interest, [187] whether it is an income interest or an interest in the corpus of the funds, the Government ought to proceed in one movement and go take it.

Mr. DeLew: I understand, Judge. I agree with you.

The Court: That's what the Government ought to be doing. Now, what you're doing here is asking me to foreclose and I can't foreclose any interest you have in the fund; as a matter of fact, you suggest that isn't the purpose anyway, you want to get the income. I can't give you anything more than the income payments that were due at the time this proceeding was filed. I can't give you the income payments that are falling due in the future.

Now, this is all bollixed up. If you want to know who did it, who got us into that fix, it's the Government. If we had anything to work with here by way of pleading to foreclose, that would help us resolve it.

My purpose in asking you gentlemen in this morning was to see if we couldn't find that here, but I don't see it. I just don't see it. We have to draw an entirely new pleading. What you filed is an answer. Everything you allege is first admission, second a denial and third, a defense, which you call an affirmative defense. The first one isn't an affirmative defense at all, as a matter of fact. What it is, in our practice here, a motion to dismiss.

The second one isn't an affirmative defense either. It [188] attacks the jurisdiction of the court and that is a ground for motion to dismiss.

So this is a most unartfully drawn pleading any way you want to look at it and there isn't anything in there about foreclosure. It doesn't spell out whether you are foreclosing upon the fund due at the time of the action or upon future payments or thirdly, upon the corpus. You are left entirely in doubt and the other parties to the lawsuit never had an opportunity to meet you on the issues in a foreclosure suit.

Mr. Munter: Mr. Leuschner certainly had the opportunity, was required under the bank's cross-complaint to come in and state his claim. We come in and state our claim. The Court gives it to the one whose claim is paramount.

The Court: Let me hear what you have offered to pay into this.

Mr. Jenks: I didn't refer, your Honor, to future funds. This is the cross-complaint starting here as to funds. That is the amount we had at that time.

The Court: \$6,991.65 at the time of the filing of the complaint and now holds \$7,462.89.

Well, all you are talking about turning over is the current income payment which was due at the time, I suppose, you filed this cross-complaint.

Mr. Jenks: You see, the cross-complaint was filed in the State court, your Honor. [189]

The Court: Yes.

Mr. Jenks: And if it hadn't been for the re-

moval and the filing of the new suit in this court we would have then made the motion under State procedure, an interpleader, but we got involved with these other procedures. But I don't see how your Honor can make a judgment in this action affecting future payments.

The Court: You think, however, we can properly make one concerning the payments which were due at the time of the filing of the cross-complaint?

Mr. Jenks: I think so, that \$7,000.

Mr. DeLew: I don't think so.

The Court: Why not? You don't think that levy was void?

Mr. DeLew: I think the levy was no good at all.

Mr. Munter: Conceding that for the sake of argument, what difference does that make?

Mr. DeLew: It makes all the difference in the world if the lien itself doesn't call for payment.

Mr. Jenks: I think I understand what you are saying, Mr. DeLew, see if I understand it. That even if the money had been deposited in court and the court had decided that Mr. Leuschner's rights were inferior to those of the United States, that because of the defective levy the Court could not have ordered the money paid to the United States.

Mr. DeLew: Exactly. [190]

Mr. Jenks: That is what I understood you to say.

The Court: Yes, I understand that. Well, what would the consequence be if you did pay it to the court or if you had paid it into the court? Either way it is bad. I order you to turn it over to the

United States. Leuschner might sue you and say, well, you improperly paid it into the court, it wasn't a proper levy, or the Court's judgment is in error in turning it over to the Government because there wasn't any proper levy, but that would be an empty move on Leuschner's part, because if that turned out to be true, the thing is going to happen the day after the situation is reversed, the Government's going to be in there with a proper levy, and the Government is going to be in there perhaps with a bill to foreclose.

I think the Government ought to sit down and study this case and proceed properly.

I don't see how I can foreclose any liens in this case at all. I don't believe there is any proper pleading on which to proceed to do that, and for the reasons I indicated at the hearing, I believe that levy is not valid.

Mr. Jenks: It would seem to me, your Honor, inasmuch as there is at least one other step to go, that the Government would have to take to reach some of these funds and to reach future funds, that if you sign a judgment in the form presented, then we will have cleaned up this case.

The Court: All right, give me a pen. [191]

Mr. Munter: If your Honor please, isn't it necessary that some of these other cross-complaints and third party pleadings be decided, be disposed of? There has been absolutely no disposition of those in the proposed findings.

Mr. Jenks: Mr. Munter, it is my theory that when you dismiss an action you dismiss all the

pleadings filed in that action. That provides for dismissal of that action.

The Court: Thank you very much.

Mr. Jenks: Thank you, your Honor.

The Court: I wanted to be clear about this before I leave town.

Mr. Jenks: Are you leaving at the end of the month?

The Court: Yes, I will be leaving in two or three days. I wouldn't mind coming back, but it would be a little unconscientious to make a trip out here to hear what we heard this morning.

Thank you very much. [192]

[Endorsed]: Filed June 7, 1957.

[Endorsed]: No. 15618. United States Court of Appeals for the Ninth Circuit. Richard D. Leuschner, Appellant, vs. First Western Bank and Trust Company, a California Banking Corporation, and United States of America, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: July 8, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15618

RICHARD D. LEUSCHNER, Appellant,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California Banking Corporation and
UNITED STATES OF AMERICA,
Appellees.

STATEMENT OF POINTS ON APPEAL

The appellant, Richard D. Leuschner, hereby adopts the statement of points on appeal heretofore filed by him on May 28, 1957, in the above entitled matter, in the United States District Court for the Northern District of California, Southern Division.

Dated: July 30th, 1957.

A. B. CANELO,
C. RAY ROBINSON,
M. S. HUBERMAN,
LEWIS, FIELD, DeGOFF and
STEIN,

/s/ By SIDNEY F. DeGOFF,
Attorneys for Appellant Richard D. Leuschner.

[Endorsed]: Filed July 31, 1957. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE
PRINTED ON APPEAL

The undersigned, Richard D. Leuschner, appellant, does hereby designate and request that all of the matters heretofore designated by him for inclusion in the record on appeal in the above entitled action be included in the printed docket and record on appeal.

Dated: July 30, 1957.

A. B. CANELO,
C. RAY ROBINSON,
M. S. HUBERMAN,
LEWIS, FIELD, DeGOFF and
STEIN,

/s/ By SIDNEY F. DeGOFF,
Attorneys for Appellant, Richard D. Leuschner.

[Endorsed]: Filed July 31, 1957. Paul P.
O'Brien, Clerk.

